(24,709)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 123.

BENITO LOVATO, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEW MEXICO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW MEXICO.

INDEX.

	Original.	Print
Caption	1	1
Transcript from the district court for county of Taos, New Mexico	1	1
Indictment returned and filed	1	1
Indictment	1	1
Arraignment and plea	3	3
Appearance bond	3	3
Motion for continuance	8	6
Order denying motion for continuance	10	8
Motion for change of venue	11	8
Affidavit of T. B. Catron and motion for continuance	14	10
Demurrer to indictment	19	13
Order overruling demurrer and calling jury for trial	20	14
Dismissal of jury to permit defendant to plead	21	15
Verdict of the jury	22	15
Instructions of the court to jury	23	16
Exceptions to the instructions	32	23
Motion for new trial and in arrest of judgment	35	25

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 9, 1916.

	Original.	Print
Requested instructions by defendant	40	28
Order overruling motion for new trial and in arrest of judgment	42	30
Judgment of the court and sentence	43	31
Order granting appeal and fixing bond	44	31
Appeal bond	45	32
Petition for additional time to perfect appeal	48	34
Order granting extension of time to perfect appeal	49	35
Clerk's certificate	50	36
Motion of Mr. Catron for instruction for verdict of not guilty at end of Territory's case	51	36
Motion for instruction for verdict of not guilty at conclusion of case	52	37
Order submitting cause on argument	52	37
Judgment	53	37
Motion for rehearing	54	38
Order denying motion for rehearing	62	43
Order of allowance of writ of error to U. S. circuit court of appeals	63	44
Opinion of the court	64	45
Opinion of the court on rehearing	78	54
Mandate from U. S. circuit court of appeals	81	56
Certificate of clerk to transcript of record	83	57
Petition for writ of error	84	57
Assignment of errors	85	58
Supersedeas bond on writ of error to U. S. Supreme Court	90	60
Writ of error from U. S. Supreme Court and allowance	93	62
Certificate of lodgment	95	63
Citation and acknowledgment of service	96	63
Precipe for record	97	64
Return to writ of error	99	65

1 Be it remembered, that heretofore, on towit, on the nineteenth day of December, A. D., 1911, there was filed in the office of the Clerk of the Territory of New Mexico, a transcript of record, in cause Numbered 1452, entitled, The Territory of New Mexico, Appellee, vs. Benito Lobato, Appellant, parts of which said transcript of record, are and were as follows, to-wit:

Be it further remembered that at a regular May Term of the District Court of the First Judicial District of the Territory of New Mexico, within and for the county of Taos, begun and held on the 2nd day of May, A. D., 1910, and on the 7th day of the May Term, the same being Monday May 9th, A. D. 1910, the following proceedings were had and entered of record to-wit:—

No. 1013. Criminal. Murder.

TERRITORY OF NEW MEXICO

vs.

BENITO LOVATO.

Comes now the Grand Jury in a body and return into open court through its foreman the above endictment, which said indictment is endorsed "A True Bill" Fred H. McCabe, Foreman of the Grant Jury," and it is ordered by the court that the said indictment be placed on file.

Be it further remembered that on the 9th day of May, A. D. 1910, there was filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico, within and for the County of Taos, an indictment, which indictment is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Taos, ss:

In the District Court, at the May Term, A. D. 1910.

2 The Grand Jurors for the Territory of New Mexico, taken from the body of the good and lawful men of the County of Taos, aforesaid, duly selected, empaneled, sworn and charged at the term aforesaid, to inquire in and for the County of Taos aforesaid, upon their oaths do present that Benito Lobato late

of the County of Taos, Territory of New Mexico, on the 29th day of December in the year of our Lord one Thousand nine hundred and nine at the County of Taos aforesaid, in and upon one Juan trujillo then and there being, unlawfully, wilfully, purposely, feloniously, with express, premeditated malice and of his deliberate, express malice aforethought, did make an assault and with a certain dangerous weapon, to-wit, a certain whip commonly called a quirt, the handle of which was then and there loaded with iron, which he, the said Benito Lobato, then and there had and held in his right hand then and there unlawfully, wilfully, purposely, feloniously, with express, premeditated malice and of his deliberate express malice aforethought did strike and beat the said Juan Trujillo, giving to him, the said Juan Trujillo, in and upon the top of the head of him the said Juan Trujillo, one mortal contusion, bruise, fracture and wound, of which said mortal wound the said Juan Trujillo thence continually languished until, on the 30th day of December, A. D. 1909, between the hours of two and three o'clock in the morning of said day, he there died. And so the Grand Jurors aforesaid, upon their oaths aforesaid, do say that the said Benito Lobato did, in manner and form aforesaid, Unlawfully, purposely, feloniously, wilfully, with express premeditated malice and of his deliberate express malice aforethought kill and murder the said Juan Trujillo, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the Territory of New Mexico.

(Signed) C. C. CATRON,
Assistant District Attorney for the Counties of Santa Fe, Taos, and Torrance.

Endorsment: No. 1013. The Territory of New Mexico vs. Benito Lobato—Murder—A True Bill—Fred H. McCabe, Foreman
3 of the Grand Jury.—Witnesses: Juan Smith, Dr. T. P. Martin, Juan Manuel Romero y Pacheco, Margarita Leyba de Trujillo, Onofre Leyba, Bonifacio Romero, Martin Vigil, Eulojio Aguilar, Mariano Sanchez, Julian Sanchez, Nemecio Sanches, Juan de Jesus Romero, Samuel Leyba, Simon Lopez, Elizardo Quintana, Faustin Leyba, Felicita G. de Martinez, Daniel Eelarde.—Filed in Clerk's Office, First Judicial District, May 9, 1910. Frank W. Sherron, Clerk.

Be it further remembered that at a regular term of the District Court of the First Judicial District of the Territory of New Mexico, within and for the county of Taos, begun and held on the first Monday of May, 1910, and on the seventh day of the said term, the same being Monday, May 9th, 1910, the following among other proceedings were had and entered of record, to-wit:—

No. 1013. Criminal. Murder.

TERRITORY OF NEW MEXICO
vs.
BENITO LOVATO.

Comes now the Territory of New Mexico in the above entitled cause by her Assistant District Attorney, Charles C. Catron, Esquire, and comes now the said defendant in his own proper person and upon the reading of the indictment herein to him in open court for plea thereto says that he is "not guilty" in manner and form as therein charged, and for his trial thereof puts himself upon the country and the plaintiff doth the like.

Be it further remembered that on the 11th day of February, A. D. 1911, there was filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico, within and for the County of Taos, a Bond, which said Bond is in words and figures as follows, to-wit:

Know all men by these presents, that we, Benito Lobato, as principal, and F. Sanches y S. Ramon Sanches, Jose M. Lopes, Facundo his
Medina Juan Estefan x Sisneros, Donaciano Craham, E. Clark, mark
4 Demostenes Martinez, P. A. Av. Rivera, David Rodriguez, Jose Hilario Lucero, Lauriano Mares, Lucas Dominguez, Jose Mottaner, Emilio Lopez, Antonio Romero and Malaquias Martinez, as his sureties, are held and firmly bound unto the Territory of New Mexico, in the sum of Fifteen Thousand Dollars ($15,000.00) for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators firmly by these presents. Signed with our signatures and sealed with our seals this the — day of January, A. D. 1911.

The condition of the above obligation is such that, whereas, the above bounden, Benito Lovato, stands indicted in the District Court for the County of Taos, Territory of New Mexico, for the crime of murder and has presented an application to the Judge of the District Court to be admitted to bail during the pendency of the said indictment. And said Judge of the District Court after hearing said petition and affidavits and other recommendations accompanying the same, has ordered that said Benito Lovato be released from custody on entering into a bond with two or more good and sufficient sureties in the sum of Fifteen Thousand Dollars, ($15,000.00), conditioned for his appearance, before the next term of the District Court to be held in and for the said county of Taos to answer said indictment.

Now, therefore, if the said Benito Lovato shall be and appear before the District Court in and for the County of Taos and Territory of New Mexico, at the next term thereof to be held in said County to

answer to said indictment pending against him and shall remain in attendance on said court from day to day and term to term and not depart from the same without leave of the court and until he has been discharged from said indictment by said court, then this obligation to be null and void, otherwise to remain in full force and effect.

(Signed)	BENITO LOVATO.	[SEAL.]	
(Signed)	F. SANCHES Y S.	[SEAL.]	$1,500.00
(Signed)	JOSE M. LOPEZ.	[SEAL.]	$500.00
(Signed)	his JUAN ESTEVAN x SISNEROS. mark	[SEAL.]	$400.00

5

(Signed)	E. CLARK.	[SEAL.]	$2,000.00
(Signed)	P. A. AV. RIVERA.	[SEAL.]	$400.00
(Signed)	DAVID RODRIGUEZ.	[SEAL.]	$200.00
(Signed)	LUCAS DOMINGUEZ.	[SEAL.]	$300.00
(Signed)	his EMILIO x LOPEZ. mark	[SEAL.]	$200.00
(Signed)	RAMON SANCHES.	[SEAL.]	$2,500.00
(Signed)	FACUNDO MEDINA.	[SEAL.]	$200.00
(Signed)	DONACIANO GRAHAM.	[SEAL.]	$500.00
(Signed)	DEMOSTENES MARTINEZ.	[SEAL.]	$500.00
(Signed)	JOSE HILARIO LUCERO.	[SEAL.]	$500.00
(Signed)	LAURIANO MARES.	[SEAL.]	$300.00
(Signed)	JOSE MONTANER.	[SEAL.]	$2,000.00
(Signed)	ANTONIO ROMERO.	[SEAL.]	$500.00
(Signed)	MALAQUIAS MARTINEZ.	[SEAL.]	$3,000.00

TERRITORY OF NEW MEXICO,
County of Santa Fé:

On this 10th day of February A. D. 1911 before me the undersigned Notary Public in and for the County of Santa Fé, personally appeared the above bounden, Benito Lovato, to me personnal-u known to be the same person who signed, sealed and executed the foregoing obligation and acknowledged the same to be his free and voluntary act and deed.

In Witness Whereof, I hereunto subscribe my hand and affix my notarial seal this the day and year last above written.

[SEAL.] (Signed) FRANK J. LAVAN,
Notary Public.

My Commission expires Sept. 9, 1914.

TERRITORY OF NEW MEXICO,
County of Rio Arriba:

On this 7th day of January A. D. 1911 before me the undersigned Notary Public in and for the county of Rio Arriba, Territory

of New Mexico, personally came F. Sanchez y S., Jose M.
6 Lopez, Juan Estevan Sisneros, E. Clark. My Commission expires in Jan. 10, 1912, F. Sanchez y, S. E. Clark, Jose M. Lopez, Juan Estevan Sisneros and each to me personally known, and each for himself acknowledged the foregoing obligation as his free act and deed, that he signed, sealed and acknowledged and the said several parties so signing said obligation as security for said Benito being duly sworn by me, respectively, testified that he was worth in real and personal property situate in the territory of New Mexico, over and above his just debts and liabilities and property exempt by law from execution the amount here set opposite his name and seal in the foregoing bond.

In Witness Whereof, I have hereunto set my hand and affised my notarial seal this the day and year last above written.

[SEAL.] (Signed) JOSÉ LOCAS MARTINEZ,
Notary Public.

My Commission expires Jan. 10, 1911.

TERRITORY OF NEW MEXICO,
County of Taos:

On this 7th day of February A. D. 1911, before me the undersigned notary public in and for the County of Taos, Territory of New Mexico, personally came Malaquias Martinez, Donaciano Graham, Demostenes Martinez, A Av. Rivera, Jose Hilario Lucero, Lauriano Mares, Jose Montaner, Antonio Romero, and, each to me being personally known, and each for himself acknowledged that he signed, sealed and acknowledged the foregoing obligation as his free act and deed, and the said several parties as signing said obligation as security for said Benito Lovato being duly sworn by me, respectively, testified that he was worth in real and personal property situate in the Territory of New Mexico, over and above his just debts and liabilities and property exempt by law from execution the amount here set opposite his name and seal in the foregoing bond.

In Witness Whereof, I have hereunto set my hand and affixed my notarial seal this the day and year last above written.

[SEAL.] (Signed) ENRIQUE GONZALES,
Notary Public.

My Commission expires Dec. 28, 1914.

7 TERRITORY OF NEW MEXICO,
County of Taos:

On this 10th day of January, A. D. 1911, before me the undersigned notary public in and for the County of Taos, Territory of New Mexico, personally came Facundo Medina, David Rodriguez, Lucas Dominquez, Emilio Lopez, and Ramon Sanches, each to me personally known, and each for himself acknowledged that he signed, sealed and acknowledged the foregoing obligation as his free act and deed, and the said several partiez so signing said obligation as security for said Benito Lovato being duly sworn by me, respectively,

testified that he was worth in real and personal property situate in the Territory of New Mexico, over and above his just debts and liabilities and property exempt by law from execution the amount here set opposite his name and seal in the foregoing bond.

In Witness Whereof, I have hereunto set my hand and affixed my notarial seal this the day and year last above written.

[SEAL.] (Signed) ABEL SANDOVAL,
Notary Public.

My Commission expires May 30, 1914.

O. K.
(Signed) E. C. ABBOTT,
District Attorney.

This Bond is hereby approved February 10th, 1911.
(Signed) JOHN R. McFIE, *Judge.*

Encorsement: No. 1013. Taos Co. Criminal. Territory of New Mexico vs. Benito Lovato. Bond, $15,000.00. Filed in Clerk's Office First Judicial District Feb. 11, 1911. Ed. L. Safford, Clerk.

Be it further remembered that on the 2nd day of May, A. D. 1911 there was filed in the office of the Clerk of the District Court of the First Judicial District in the Territory of New Mexico, within and for the County of Taos, a Motion for Continuance, which said motion for continuance is in the words and figures as follows, to-wit:

8 In the *Sid*trict Court of the First Judicial District Sitting in and for the County of Taos, Territory of New Mexico.

No. —.

TERRITORY OF NEW MEXICO
vs.
BENITO LOBATO.

Comes now the defendant in the above entitled cause and moves the court to continue the same for the following rea-ons, and for ground of such continuance states:

1st. That there are at the present time absent from the Territory three witnesses who are material witnesses of this defendant in presenting his defense.

2nd. That the defendant was incarcerated from the last term of court until the 11th day of February, 1911, at which time he procurred his release and returned to his home at Chamisal.

3rd. That upon arriving at his home in Chamisal he immediately sought one Juan Romero, one Matias Basquez, and one Juan de Jesus Lucero, who are the witnesses hereinabove referred to, and learned that they were absent; that the said witnesses Juan Romero, Matias

Basquez and Juan de Jesus Lucero lived and have their residence in the town of Chamisal.

4th. That defendant inquired at the homes and residences of the above named witnesses as to their whereabouts and learned that Juan Romero is in the State of Colorado herding sheep; that Matias Basquez is some place in the White Mountains close to the boundary line of Colorado engaged in cutting ties; that Juan de Jesus Lucero is some place in the state of Wyoming herding sheep.

5th. That it is impossible for defendant to ascertain the correct addresses of the above named witnesses so that he might procure their attendance at this term of the court.

9 6th. That without knowing the whereabouts of said witnesses it has been impossible for this defendant to obtain the presence of such witnesses or their testimony.

7th. That defendant believes that the witnesses Juan Romero and Matias Basquez will prove that Juan B. Trujillo, the deceased, on the 29th day of December, 1909, sought defendant with deliberate intent of fighting with said defendant and doing him the said defendant, great bodily injury, and that they were present when Juan B. Trujillo stated that he was going out to hunt for this defendant.

8th. That defendant believes that the witness Juan de Lucero will prove that Juan B. Trujillo sought defendant with deliberate intent of fighting with him, the defendant, and doing him great bodily injury, and accompanied the said Juan B. Trujillo to where the said defendant was and saw the said Juan B. Trujillo strike the defendant in the head with a rock, knocking the said defendant down and causing a dangerous wound above the right eye of defendant.

9th. That defendant believes such facts as hereinbefore stated to be true.

10th. That defendant knows of no other witnesses by whom he can prove such facts fully.

11th. That defendant believes that he can procure the attendance or the testimony of such witnesses at the next regular term of court in Taos County, for the reason that such witnesses will return to their homes during the winter and can then be subpœnaed as witnesses to appear at the next regular term.

(Signed) BENITO LOVATO.

Subscribed and sworn to before me this 2 day of May, A. D., 1911.

[SEAL.] (Signed) EDW. L. SAFFORD, *Clerk.*

CATRON & CATRON,
Attorneys for Defendant,
Santa Fé, N. M.

10 Endorsement: No. 1013. In the District Court County of Taos—Territory of New Mexico, v. Benito Lovato—Motion—Filed in open Court May 2nd, 1911, Sec. Day, Edw. L. Safford, Clerk.—Catron & Catron, Attorneys for defendant, Santa Fé N. M.

Be it further remembered that at a regular term of the District Court of the First Judicial District of the Territory of New Mexico, within and for the County of Taos, begun and held on the first Monday of May, 1911, and on the Second Day of the said Term, the same being Tuesday, May 2nd, 1911, the following among other proceedings were had and entered of record: to-wit:—

No. 1013. Criminal. Murder.

TERRITORY OF NEW MEXICO
vs.
BENITO LOBATO.

Comes now the plaintiff in the above entitled cause by the Assistant District Attorney, E. P. Davies, Esquire, and comes now the defendant, Benito Lobato, in his own proper person, attended by his counsel Messrs. Catron & Catron, who file in open court a motion for continuance; whereupon, the court hears argument of counsel for both plaintiff and defendant for and against said motion and being otherwise sufficiently advised in the premises, denies said motion as it stands but grants leave to the defendant to amend said motion.

And now again comes the plaintiff and defendant by their attorneys E. P. Davies, Esquire, for the plaintiff and Catron & Catron for the defendant. Said Attorneys for defendant file in open court their amended motion for continuance. The motion is not argued but counsel for defendant state to the court they are going to file a motion for a change of venue.

Be it further remembered that on the 2nd day of May, A. D. 1911, there was filed in open court at the May 1911 Term of the District Court for the first judicial District of the Territory of New
11 Mexico, within and for the County of Taos, an amended motion for continuance, which said amended motion for continuance is in words and figures as follows, to-wit:—

In the District Court of the First Judicial District, Sitting in and for the County of Taos, Territory of New Mexico.

TERRITORY OF NEW MEXICO
vs.
BENITO LOVATO.

Comes now the defendant in the above entitled cause and moves the court to continue the same for the following reasons, and for grounds of such continuance states;

1st. That there are at the present time absent from the Territory three witnesses who are material witnesses of this defendant in presenting his defense.

2nd. That the defendant was incarcerated from the last term of court until the 11th day of February, 1911, in the penitentiary at

Santa Fé, at which time he procured his release and returned to his home at Chamisal.

3rd. That upon arriving at his home in Chamisal, he immediately sought one Juan Romero, one Matias Basquez and one Juan de Jesus Lucero, who are the witnesses hereinabove referred to, and learned that they were absent.

4th. That the said witnesses Juan Romero, Matias Vasquez and Juan de Jesus Lucero reside in the town of Chamisal.

5th. That such witnesses are not absent from this Territory through procurement of this defendant or any agent or representative of his.

6th. That upon learning of the absence of the said witnesses defendant inquired at the homes and residences of the above named witnesses as to their whereabouts, and learned that Juan
12 Romero is in the State of Colorado herding sheep, but could not learn in which particular part of the State of Colorado the said Juan Romero is located; that Matias Vasquez is some place in the White Mountains close to the boundary line of Colorado, engaged in cutting ties but could not learn the exact location of said Matias Vasquez; that Juan de Jesus Lucero is some place in the State of Wyoming herding sheep, but could not learn in which particular part of such State he was located.

7th. That it has been impossible for defendant to ascertain the addresses of the above named witnesses, so that he might communicate with them and procure the presence of such witnesses or their testimony at this term of Court.

8th. That without knowing where to reach the said witnesses, it has been impossible for this defendant to procure the presence of such witnesses or their testimony.

9th. That defendant believes that the witnesses Juan Romero and Matias Vasquez will testify to and prove the following.

'That on the 29th day of December 1909, they were with Juan B. Trujillo. That at such time Juan B. Trujillo stated to said Juan Romero and Matias Vasquez that he was going out to hunt Benito Lovato, and that if he should find said Benito Lovato, he Juan B. Trujillo would give him a good beating; that the said Juan B. Trujillo immediately after such conversation went to where Benito Lovato was.

10th. That defendant believes that the witness Juan B. Lucero will testify to and prove the following.

That on the 29th day of December, 1909, he was with Juan B. Trujillo, Juan Romero and Matias Vasquez. That at such time Juan B. Trujillo stated in his presence that he was going out to hunt Benito Lovato, and that if he should find Benito Lovato, he Juan B. Trujillo would give him a good beating; that immediately
13 after such conversation the said Juan B. Trujillo accompanied by said Juan de Jesus Lucero, went to where Benito Lobato was and upon arriving at such place, said Juan B. Trujillo, said to Benito Lovato "You son *a* a *both*, this is the way to hit" and immediately struck the said Benito Lovato in the head with a large rock, -nocking the said Benito Lovato down; that immediately thereafter

a general fight commenced, in which there were at least a half dozen persons engaged; that Juan B. Trujillo took part in such fight and was there badly wounded, that the said fight took place south of the town of Trampas.

11th. That the defendant believes such facts as hereinabove stated to be true.

11th. That the defendant knows of no other witnesses by whom he can prove such facts fully.

12th. That defendant believes that he can procure the attendance or testimony of such witnesses at the next regular term of the court in Taos County, and he gives as his reason for such belief:

That the said witnesses reside and have their homes in Chamisal and always return to their homes in the winter, where they can be served with a summons to appear at the next term of court in Taos County. That the clerk of the court has been by defendant requested to issue summons directed to such witnesses and to place the same in the hands of the sheriff.

(Signed) BENITO LOVATO.

Subscribed and sworn to before me this second day of May, 1911.

[SEAL.] (Signed) EDW. L. SAFFORD, *Clerk*.

CATRON & CATRON,
Att'ys for Defendant,
Santa Fé, N. M.

14 Endersoment: No. 1013. Taos County. Territory of New Mexico vs. Benito Lovato—Motion—Filed in Open Court May 2, 1911, Ed. 1. Safford Clerk.

Be it further remembered that on the 23rd day of May, A. D. 1911, there was filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico within and for the County of Taos, an affidavit of T. B. Catron, Esquire, and additional motion for continuance, which said affidavit of T. B. Catron Esquire, and additional motion for continuance, is in words and figures as follows, to-wit:—

In the District Court of the First Judicial District, Sitting in and for the County of Taos, Territory of New Mexico.

TERRITORY OF NEW MEXICO
vs.
BENITO LOVATO.

Thomas B. Catron being duly sworn in the above entitled cause says: that he is the attorney and the only attorney who has been employed to represent Benito Lovato, the defendant in the above entitled cause; that before he knew of the present adjournment term of the District Court for the County of Taos and while he was

under the impression that said court would be adjourned when Judge Abbott left Taos to return to Albuquerque, he, as attorney for Henry Wilson in a very important coal land case pending before the Register and Receiver of the land Office at Santa Fé, agreed as such attorney to appear before such Register and Receiver of the Land Office and represent Henry Wilson on the 26th day of this monty at the hearinf in the said land matter which was fixed by the Register and Receiver for that day; further that he is the Attorney representing Mrs. Trinidad Baca in an ejectment case pending in the District Court for the County of San Miguel
15 in — she is plaintiff against one Peter Roth, a case which has been pending in said court for many years last past and which was at the last term of court striken from the docket with leave to reinstate, and at the present term of that court the same was reinstated with a distinct understanding and statement by the Judge that the case must be disposed of before the next term of court; that said cause is one to be tried before a jury and the jury causes in said court, as affiant is informed and believes, outside of the last mentioned case will in all probability be concluded by Thursday the 23rd inst. or not later than Wednesday at which time the said last mentioned cause can be tried by a jury, and only at that time. That affiant is the only attorney in the said cause for said plaintiff and *as* at the earnest instance of his client promised to be in attendance at the present term of the court at Las Vegas to try said cause before the jury prior to the discharge of the petit jury at the present term of said court; that a jury in said cause will be called on Wednesday or Thursday of the present week, and should he not be in attendance said cause will have to be tried before the court before the next term of the court or dismissed; that the property involved in said suit is quite a large lot of land, a considerable portion of which lies within the subusbs of the City of East Las Vegas and is worth from fifty to one hundred dollars per acre and constitutes nearly all of the available property owned by the plaintiff, and should she lose it, it would leave her in poverty and absolute want; that this sair arrangements were made for the trial of said cause when this affiant had no information in regard to the fact that this adjourned term of the court in Taos was to be held and that the above entitled cause would probably be called on for trial. Affiant further states that he is reliably informed and verily believes that several of the most material witnesses for
16 the defendant in the trial of the entitled cause, to-wit Juan Romero, Matias Vasquez, and Juan de Jesus Lucero are absent from the Territory and are and have been so absent for several months last past so that their attendance could not be obtained at the present term of this court; that as he is informed and believes and having talked with some of the said witnesses that their evidence will be very material to the defense on the trial of said cause, and that their personal attendance as witnesses in said cause will be absolutely necessary and essential; that the facts which they know and can be testified to he understands will be wholly or in part contradicted or controverted by some of the witnesses for the

prosecution and that the testimony of the witnesses pro and con will be so much mixed and tangled up that it would be impossible to make any direct statement of all the facts, which the said three witnesses know, specifying the particular details and minute circumstances surrounding the same as they might be attempted to be brought out by the witnesses on behalf of the Territory in contradiction *with* or in conflict with the testimony given by the said three witnesses; that he is informed and believes that there will be an attempt on behalf of the Territory through its witnesses to prove certain facts and circumstances in detail of conflict with and inconsistent with, and in contradiction of the matters which the said three witnesses aforesaid for the defendant can and will testify to if personally present. But as he is informed that the said witnesses for the Territory will testicy from a made up state of facts and not from the real truth in everything, it is impossible to know just what evidence they will give or what pretended facts they will attempt to bring out in evidence, so that it is impossible to set out in any statement which might be admitted by the prosecurion the full and complete detail and circumstances connected with and surrounding the evidence which can and will be given by
17 the said three witnesses if they are personally present to testify in said cause; that the crime charged against the defendant in question is altogether too grave and too important to him for him to trust to the fact that the witnesses on behalf of the Territory, who are relatives mainly of the deceased, and who are aggrieved and feel great resentment against this defendant will confine themselves literally to the truth and only to the truth and for that reason it is very essential and necessary that he should have the said three witnesses present who would be able to correct and explain away any wrongful or untrue statement made by witnesses on behalf of the prosecution. Besides he is advised and believes, as a lawyer, that it is the right of the defendant to have his witnesses present to testify, especially as he does not know every single fact so as to state the same to which the said witnesses for him would be able to testify particularly as to matters of detail and circumstances about which no two witnesses ever exactly agree. Affiant, therefore, earnestly insists that the said cause shall be continued until the next term of this court until he can be present to attend to said cause for his said client, he having been fully paid his compensation for the same amounting to several hundreds of dollars, which amount he would have to refund to the defendant and might be subject otherwise for damahes if he did not attend to the trial of said cause; and he insists upon the portponement of the said cause until the next term, for the further reason that he absolutely believes that it is undoubtedly necessary and essential that the said defendant shall have in attendance on the trial of said cause the said three named witnesses who are residents of the county of Taos, New Mexico, but who are now temporarily absent from the Territory, but will be back, as he is informed and believes, to the County of Taos so as to be able to testify personally in said cause as
18 to all and every of the facts, circumstances and details in said cause which are known to them in reference to said

cause and which cannot all exactly be known to this affiant nor to this defendant from the standpoint of said witnesses. Affiant verily believes that the said witnesses will be present at the next term of said court to give their evidence in said cause, and that he will also be present at the said term of court to represent the defendant in said cause; that it is impossible for him to be present at the present term of the court on account of his said engagements to be present at another court in the Territory and attend to a cause for another of his clients which he had agreed to do in ignorance of the fact that this court would be adjourned for the present time *time* and the above entitled cause possibly called for trial. He, therefore, prays that the above entitled cause be continued until the next term of the court.

(Signed) THOMAS B. CATRON.

Subscribed and sworn to before me this 22nd day of May, A. D. 1911.

[SEAL.] (Signed) TEMPE WILLISON,
Notary Public.

My Commission expires October 10, 1914.

Endorsement: No. 1013. In the District Court, County of Taos. Territory of New Mexico, Plaintiff, vs. Benito Lovato, Defendant.—Affidavit of T. B. Catron and Additional motion for continuance.—Filed in Clerk's Office, First Judicial District, May 23rd, 1911. Edw. L. Safford, Clerk.—Catron & Catron, Santa Fé N. M.—Attorneys for Defendant.

Be it further remembered that on the 24th day of May A. D. 1911, there was filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico within and for the County of Taos, a Demurrer, which said demurrer is in words and figures as follows, to-wit:—

19 In the *Sid*trict Court of the County of Taos, Territory of New Mexico.

No. 1013.

TERRITORY OF NEW MEXICO
vs.
BENITO LOVATO.

Comes the defendant, Benito Lovato, in the above entitled cause, and says, that the indictment which is preferred against him in said cause is insufficient in law to compel him to plead thereunto and he therefore demurs to the same and says:

1. Said indictment does not charge any offence or crime known to the law.

2. Said indictment does not charge that the deceased died of the mortal wound alle*h*ed to have been inflicted by defendant.

3. Said indictment does not allege facts sufficient to show that the deceased died within a year and a day after the wounds were inflicted.

4. Said indictment is in many other respects uncertain, defective, evasive and indefinite, to such an extent that this defendant should not be called upon to plead to the same.

(Signed) T. B. CATRON,
Att'y for Def't.

Endorsement: No. 1013—Territory of New Mexico v. Benito Lovato—Demurrer—Filed in Clerk's Office First Judicial District May 24th, 1911, Edw. L. Safford, Clerk.

Be it further remembered that at a regular term of the District Court of the First Judicial District of the Territory of New Mexico, within and for the County of Taos, begun and held on the First Monday of May, 1911, and on the Third Day of the adjourned May Term, the same being Wednesday, May 24th, 1911, the following among other proceedings were had and entered of record, to-wit:

20 No. 1013. Criminal. Murder.

TERRITORY OF NEW MEXICO
vs.
BENITO LOVATO.

Comes now the plaintiff in the above entitled cause by her District Attorney, E. C. Abbott, Esq., and her Special Prosecutor, A. B. Renehan, Esq., and comes now the defendant, Benito Lovato, in his own proper person, attend- by his counsel, C. C. Catron, Esq.

Attorney for defendant calls up for hearing the amended motion of the defendant for a continuance of the above cause, heretofore filed in this cause, on the 2nd day of May, 1911, the same being the 2nd *the 2nd* day of the regular May term of the District Court for the County of Taos, for the year 1911; whereupon the court hears arguments of counsel for an*a* against said motion, and being otherwise sufficiently advised in the premises, overrules the same.

And now again comes said attorney for said defendant and calls up for hearing the additional motion for a continuance or affidavit of T. B. Catron, whereupon the court hears the argument of counsel for and against said motion, and being otherwise sufficiently advised in the premises, overrules the same.

And now again comes said attorney for said defendant and calls up for hearing the demurrer, heretofore filed on, to-wit, the 23rd day of May, to said indictment; whereupon the court hears the arguments of counsel for and against said demurrer, and being otherwise sufficiently advised in the premises, overrules the same.

Whereupon, both parties announce themselves ready for trial, and now comes the jury as follows, to-wit:

Jose L. Mondragon,	Trinidad Mondragon,	Predo N. Vigil,
Eulogio Martinez,	Esequias Vigil,	Juan B. Romero,
Leoneres Gonzales,	Alberto Lopez,	Ramon Trujillo,
Abad Varos,	Estevam Martinez,	Manuel Pacheco,

21 twelve good and lawful men taken from the body of the county of Taos and Territory of New Mexico, duly empanelled, selected, accepted and sworn to well and truly try the issues joined in the cause now pending, and a true verdict therein to render according to the law, the evidence and the instructions of the court.

That thereupon the witnesses for both plaintiff and defendant were called and sworn and placed under the rule.

That thereupon it appearing to E. C. Abbott, Esq., District Attorney, that defendant had not been arraigned and had not plead since the over-ruling of defendant's demurrer, upon motion the court dismissed the jury and directed that the defendant be arraigned and plead.

Thereupon, upon the reading of the indictment herein to the defendant, Benito Lovato, in open court, for plea thereto, says that he is "not guilty" in manner and form as therein charged.

And now the issues in the above entitled cause being joined, both parties again announce themselves ready for trial, and now comes the jury as follows, to-wit:

Jose L. Mondragon,	Trinidad Mondragon,	Pedro Vigil,
Eulogio Martines,	Esequias Vigil,	Juan B. Romero,
Leoneres Gonzales,	Alberto Lopez,	Ramon Trujillo,
Abad Varos,	Estevan Martinez,	Manuel Pacheco,

twelve good and lawful men taken from the body of the County of Taos, and Territory of New Mexico, sworn to well and truly try the issues joined in the cause now pending, and a true verdict therein to render according to the law, the evidence and the instructions of the court; hear a portion of the evidence and retire in care and custody of two duly and especially sworn bailiffs of this Court for the night. It is ordered that the court do now adjourn until tomorroe motning at nine o'clock.

22 Be it remembered that at a regular term of the District Court of the First Judicial District of the Territory of New Mexico, within and for the County of Taos, begun and held on the first Monday of May, 1911, and on the Fourth day of the adjourned May Term, the same being Thursday, May 25th, 1911, the following among other proceedings were had and entered of record, to-wit:

No. 1013. Criminal. Murder.

TERRITORY OF NEW MEXICO
vs.
BENITO LOVATO.

And now again comes the plaintiff in the above entitled cause by her District Attorney, E. C. Abbott, Esq., and her Special Prosecutor

A. B. Renehan, Esq., and now again comes the defendant by his counsel C. C. Catron, Esq., and now again comes the jury heretofore empanelled and sworn to try this cause. Territory introduces evidence in chief and rests. Defendant introduces evidence in rebuttal. Counsel for plaintiff and defendant address the jury. The court instructs the jury. The jury retire in the care of two duly and specially sworn bailiffs of this court to consider of their verdict.

And now comes the jury into open court in a body and present to the court that they have agreed upon the following verdict, to-wit:

No. 1013. Murder.

TERRITORY OF NEW MEXICO
vs.
BENITO LOVATO.

"We, the jury, find the defendant, Benito Lovato, 'Guilty of Voluntary Manslaughter.'"
(Signed) JOSE L. MONDRAGON, *Foreman.*"

Thereupon counsel for defendant gives notice of the filing of a motion for a new trial. The jury is excused with thanks of
23 the court.

Be it further remembered that on the 25th day of May, A. D., 1911, there was filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico, within and for the County of Taos, Instructions of the court to the jury, which said instructions of the court to the jury are in words and figures as follows, to-wit:

In the District Court of the First Judicial District, Sitting in and for the County of Taos, Territory of New Mexico.

No. 1013. Murder.

TERRITORY OF NEW MEXICO
vs.
BENITO LOVATO.

Instructions to the Jury.

GENTLEMEN OF THE JURY:

I.

The defendant is charged in the indictment with the murder of one Juan Trijillo. To this charge the defendant has entered a plea of not guilty, which places upon the Territory the burden of establishing his guilt to your satisfaction beyond a reasonable doubt.

II.

Murder is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.

III.

Express malice is the deliberate intention, unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof.

24

IV.

Malice should be implied when no considerable provocation appears, or when all the circumstances of the killing show a wicked and malignant heart.

V.

Malice is not confined in its meaning to ill will toward the person killed, but it denotes an act done with a wicked mind, devoid of the sense of a social duty and fatally bent on mischief.

VI.

The statute define- murder in the first degree as follows:—All murder which shall be perpetrated by means of poison or laying in wait, torture, or by aby kind of wilful, deliberate and premeditated killing or which is committed in perpetration of or attempt to perpetrate any felony, or perpetrated from a deliberate and premeditated design unlawfully and maliciously to effect the death of any human being, or perpetrated by any act gr-atly dangerous to the lives of others, and indicating a depraved mind regardless of human life, shall be deemed murder in the first degree. All other kinds of murder shall be deemed murder in the second degree.

VII.

Wilfully means the doing of an act knowingly and intentionally and one which is not the result of accident or misfortune.

VIII.

Unlawfully means contrary to law, that is, without legal excause or justification.

IX.

An assault is an unla-ful attempt coupled with a present ability to commit a violent injury upon the person of another.

X.

As to venue, that is whether or not the deceased was assaulted and died in the County of Taos, I charge that while you must
25 find that said assault was committed and the deceased died in this county of Taos, yet it is not necessary that these facts

be established by the evidence beyond a reasonable doubt but it is sufficient if these facts are established by a preponderance of the evidence, that is by the greater weight of the evidence.

XI.

Bearing in mind these definitions and explanations the court charges you that if you believe from the evidence beyond a reasonable doubt that on the 29th day of December, A. D. 1909, in this County of Taos and Territory of New Mexico, the defendant did make an assault upon the said Juan Trujillo with a certain whip commonly called a quirt, the handle of which was then and there loaded with iron, which the defendant then and there had and held in his hands, thereby then and there inflicting in and upon the head of the said Juan Trujillo a mortal wound, of which mortal wound he, the said Juan Trujillo, thence continually languished until on the 30th day of December, A. D. 1909, he there died, and that such striking, beating and killing was done unlawfully, maliciously, wilfully, deliberately, premiditatedly and from a deliberate and premeditated design in a cool state of the mind unlawfully and maliciously to effect the death of the said Juan Trujillo and was done without excuse or justification, then you should find the defendant guilty of murder in the first degree as charged in the indictment.

XII.

As to premeditation and deliberation, I charged you that if you believe from the evidence beyond a reasonable doubt that the defendant formed the purpose maliciously to kill the said Juan Trujillo and had meditated and deliberated in a cool state of mind upon so doing, if he did so, then no matter how short the time of such deliberation and premeditation, though it be for only
26 a single moment, it will be sufficient. All that is required upon this point is that the design to kill was really formed in the mind of the defendant while in a cool state at or immediately before he so killed the said Juan Trujillo, if he so did.

XIII.

Although the jury believe from the evidence beyond a reasonable doubt that the defendant without justificiable cause or legal excuse, as explained in these instructions, killed the deceased, still if you entertain a reasonable doubt whether the killing was wilful, deliberate and premeditated, or whether the assault was committed with deliberate intent on the part of the defendant, that the striking and beating would take the life of the deceased, then the jury should find the defendant guilty of murder in the second degree.

XIV.

You are instructed that if, after a careful and dispassionate consideration of all the proof and circumstances before you, you have

any reasonable doubt as to whether the defendant is guilty of murder in the first or second degree, then you should consider whether or not he is guilty of voluntary manslaughter.

XV.

Voluntary manslaughter is the unlawful killing of a human being without malice upon a sudden quarrel or in the heat of passion. In cases of voluntary manslaughter there must be a serious and highly provoking injury inflicted upon the person killing sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing. The killing must be the result of the sudden, violent impulse of passion, supposed to be irresistible, for if there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and punished as murder.

27 XVI.

If, therefore, the jury believe from the evidence beyond a reasonable doubt that the defendant without justifiable cause or legal excuse, as explained in these instructions, killed the deceased, and that such killing was without malice and done upon a sudden quarrel between the defendant and Juan Trujillo or in the heat of passion and under such provocation as was reasonably calculated to excite ungovernable passion, then the jury should find the defendant guilty of voluntary manslaughter.

XVII.

The defendant in this case relies on the plea of self defense. A person may repel *for* force by force in the defense of his person, against on*w* who manifestly intends and endeavors by violence to take his life or to do him great bodily harm, and if a conflict ensue under such circumstances and life be taken, the killing is justifiable. It must, however, appear that the assault was imminently perilous, and unless there be a plain manifestation of an intent to take life or to do great bodily harm, no assault will justify the killing of the assailant. A person is not compelled to flee when attacked by another armed with a deadly weapon, if by fleeing he puts himself in greater danger than — would by standing his ground and defending himself. But before he can justify the homicide the attack must have been so imminently perilous that the person attacked has no convenient or reasonable mode of retreat. But if he cannot safely retreat he may stand and defend himself even to the extent of taking his adversarry's life. And if you believe from the evidence that on the occasion of the killing of the said Trujillo the deceased made a violent assault upon the defendant with a rock and that such assault was imminently perilous to the life of the defendant

or placed him in imminent peril of great bodily harm from
28 the deceased, from which assault the defendant had no reasonable or convinient more of excape, by retreat or coult avoid the combat with safety, and the defendant in order to save his life or himself from great bodily har-, struck the deceased on the head with a loaded *wuirt*, from which striking the deceased died, then you are instructed that such killing was justifiable and you will in that event a-quit the defendant.

XVIII.

The court instructs the jury, that if they find from the evidence that the deceased had stru-k the defendant *in* the head with a rock, causing this defendant to stagger backward, and was attacking and about to strike defendant a second time, when the defendant was regaining his feet, and that defendant believed and had reasonable cause to believe that the deceased was about to strike defendant with a rock then the defendant was not bound to flee or retreat, but had the right to defend himself from such threatened attack.

XIX.

Although there may have been no actual danger to the life of the defendant, or danger of great bodily harm to him from the assault of the deceased, if he made such assault, still if the circumstances surrounding the same were such as to cause an ordinary prudent man to believe there was eminent danger of his life or eminent danger of great bodily harm to him from such assault, and if the defendant believed at the time of such assault in the existence of such eminent danger, this belief under such circumstances furnishes as complete a defense for the defendant as if the danger actually existed. And to determine whether there was reason to believe that danger did exist, the appearance must be viewed from the standpoint of the person who acted upon the mind from no other standpoint.

XX.

If you should believe beyond a reasonable doubt that the
29 defendant struck and killed the deceased with a loaded quirt, before you will acquit the defendant on his plea of self defense you should believe.

1st. That the defendant was free from fault in bringing on the difficulty that is, that he did not say or do anything for the purpose of bringing on a difficulty, nor must he be disregardful of the consequences in this respect of any wrongful word or act.

2nd. There must have been a present impending peril to defendant's life or of great bodily harm to him, either real or apparent, as to create the bona fide belief of an existing necessity.

3rd. That the defendant could not have avoided the combat without danger to his life or of great bodily harm to him.

4th. That the deceased assaulted the defendant with a deadly weapon.

XXI.

By the term "deadly weapon," is meant any object for instance a rock large enough and heaby enough so that dangerous wounds can be inflicted with it.

XXII.

The term "great bodily harm" as used in these instructions does not mean any physical injury, it means an injury such as will not mean any physical injury, it means an injury such as will maim or disfigure a person permanently. I instruct you that an assault upon a person with the naked fists even by a stronger or more powerful man is not such an assault as would justify the person assaulted in killing his assailant in self defense.

30 XXIII.

The jury are instructed that the right of self defense is only given in emergencies to enable persons who are attacked and to whom it may reasonably appear that their lives or bodies are in danger of great bodily injury, to defend themselves; that this right is based upon what reasonable persons, having due regard for human life, would do under similar circumstances, and the actions of the defendant in this case must be measured by this rule.

XXIV.

The defendant is presumed to be innocent until his guilt is established by the evidence to your satisfaction beyond a reasonable

* * * * * * *

persons, having due regard for human life, would do under similar circumstances, and the actions of the defendant in this case must be measured by this rule.

XXIV.

The defendant is presumed to be innocent until his guilt is established by the evidence to your satisfaction beyond a reasonable doubt. To the benefit of this presumption the defendant in this case is entitled, and it stands as his sufficient protection until it has been removed by facts establishing his guilt beyond a reasonable doubt.

XXV.

A reasonable doubt is such a doubt as would cause a reasonable and prudent man in the graver and more important affairs of life to pause and hesitate upon the truth of the matters charged. But

a reasonable doubt is not a mere possibility of innocence, nor a caprice, shadow or speculation as to innocence not arising out of the evidence or the want of it. The jury should patiently and dispassionately weigh and consider the testimony and bring to bear upon it the exercise of common sense and judgment as reasonable men. And if, after cons-dering all the evidence, you can say that you have an abiding conc*i*vtion of the truth of the charge then you are satisfied beyond a reasonable doubt.

XXVI.

You are the sole judges in this case of the credibility of the witnesses and the weight to be given to their testimony and for the purpose you may consider the fairness or unfairness,
31 the prejudice bias or interest in the result of your verdict, if any, of any witnesses who have testified before you, his demeanor while testifying his apparent carefulness and fairness on the stand, his opportunity to know and correctly relate the facts and whether his testimony is possitive or negative in character and determine from the whole of the evidence where the truth in the case lies.

XXVII.

If you believe any witness has knowingly and wilfully testified falsely upon any material point in issue in this case, you will be at liberty to disregard all or any portion of his testimony unless the same is corroborated by other competent evidence in the case which you believe to be true.

XXVIII.

If in the opinion of the jury although they find the defendant guilty in some degree, yet *their* exist in the case any extraordinary facts, the jury may recommend the defendant to the clemency of the court and the law makes it the duty of the court to take such recommendation into consideration in passing sentence on the defendant.

XXIX.

Upon your retirement to deliberate upon your verdict you will select one of your number as foreman, who when you have agreed upon your verdict will sign it and then your verdict will be returned by all of you in open court. Your verdict will be in one of the following forms:

1st. "We, the jury, find the defendant guilty of murder in the first degree as he stands charged in the indictment.

2nd. We, the jury, find the defendant guilty of murder in the second degree as he stands charged in the indictment.

3rd. We, the jury, find the defendant guilty of voluntary manslaughter.

4th. We, the jury, find the defendant not guilty.

32 (Signed) MERRITT C. MECHEM, *Judge.*

Endorsement: No. 1013. In the District Court, County of Taos. Territory of New Mexico vs. Benito Lobato. Instructions to the Jury. Filed in open court First Judicial District May 25, 1911. Edw. L. Safford, Clerk.

Be it further remembered that on the 27th day of May, A. D. 1911, there was filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico, within and for the county of Taos, Exceptions of defendant to the instructions of the court to the jury, which said Exceptions of defendant to the instructions of the court to the jury are in words and figures as follows, to-wit:

In the District Court of the First Judicial District, Sitting in and for the County of Taos, Territory of New Mexico.

No. —.

TERRITORY OF NEW MEXICO
vs.
BENITO LOVATO.

Exceptions to the Instructions.

I.

Defendant excepts to the fourth instruction for the reason that said instruction makes it obligatory to imply malice in certain cases and under certain conditions which is contrary to law and for the further reason that the said instruction is not in accordance with the definition prescribed in the statutes of the Territory of New Mexico.

II.

Defendant excepts to the sixth instruction for the reason that there is no evidence in the case to support murder in the first degree, and that the court by instructing the jury as to murder in the first degree is presenting to the jury for its consideration a false issue.

33

III.

Defendant excepts to the tenth instruction for the reason that it is not the correct law and because it is contradictory to other instructions in that in instruction number eleven the jury is instructed that the prosecution must prove beyond a reasonable doubt on the 29th day of December, A. D. 1909, in the County of Taos and Territory of New Mexico defendant killed deceased.

IV.

Defendant excepts to the eleventh instruction in that it is too broad and does not limit the conditions under which the jury should find

the defendant guilty of murder in the first degree, to the meterial allegations of the indictment, but instructs them to find a verdict of murder in the first degree on evidence which does not prove the meterial allegations of the indictment.

V.

Defendant excepts to the fourteenth instruction for the reason that a murder indictment does not charge the crime of manslaughter and an instruction upon a crime not embraced in the issues presented to the jury is improper.

VI.

Defendant excepts to the fifteenth instruction for the same reason contained in the fifth exception, and for the further reason that said instruction does not present the law correctly.

VII.

Defendant excepts to the sixteenth instruction for the reason that it is too broad and is not confined to the issues in the case, if manslaughter be deemed an issue in this case, but leaves the question of how, when and where the killing was done indefinite, and for further reasons that a conviction for manslaughter cannot be had or accepted upon an indictment charging murder.

VIII.

Defendant excepts to the seventeenth instruction for the
34 reason that a person is never compelled to retreat when attacked by another, but may stand his ground and fight back repelling force by force, and for the further reason that the defendant is not compelled to weight his changes of retreat as against his chances in the conflict before he is entitled to fight back and defend himself.

IX.

Defendant excepts to the third and fourth paragraphs of the twentieth instruction for the reason that they are contrary to the law.

X.

Defendant excepts to the twenty-second instruction for the reason that the law does not require that an assailant be armed with a deadly weapon before the defendant can avail himself of the plea of self defense, and if in resisting an attack by such assailant who is not armed with a deadly weapon but of such physical strength as to cause defendant, as a reasonable thinking man, to be in fear of his life or of receiving great bodily injury, defendant kills such assailant, he is in law justified in so doing on the ground of self defense.

XI.

Defendant excepts to the twenty-eighth instruction for the reason that it is an improper instruction unless requested by defendant.

XII.

Defendant excepts to the twenty-ninth instruction for the reason that the verdict of manslaughter and the verdict of murder in the first degree are verdicts which cannot be supported by the evidence and which are improperly given.

XIII.

Defendant excepts to each and every instruction given and not asked by the defendant and which it was not the duty of the court under the law to give and to each and every instruction asked
35 for by the defendant and refused by the court.

(Signed) C. C. CATRON,
Attorney for Defendant.

Endorsement: No. 1013. In the District Court, County of Taos. Territory of New Mexico vs. Benito Lovato. Exceptions to the instructions. Filed in open court First Judicial District May 27, 1911. Ed. L. Safford, Clerk. Catron & Catron, Attorney- for defendant, Santa Fé, N. M.

Be it further remembered that on the 27th day of May, A. D. 1911, there eas filed in the office of the Clerk of the District Court of the First Jidicial District of the Territory of New Mexico, within and for the County of Taos, a Motion for new trial and in arrest of judgment, which said motion for new trial and in arrest of judgment is in words and figures as follows, to-wit:

In the District Court of the First Judicial District, Sitting in and for the County of Taos, Territory of New Mexico.

No. —.

TERRITORY OF NEW MEXICO
vs.
BENITO LOVATO.

Motion for New Trial and in Arrest of Judgment.

Comes now the defendant and moves the court to arrest judgment in the above entitled cause and for new trial and for grounds of said motion states:

1. The court erred in overruling defendant's motion, dictated in the record at the close of the case of the Territory, asking that the court direct the jury to return a verdict of not guilty.

2. The court erred in overruling defendant's motion dictated in the record, at the close of the taking of the evidence of the Territory, asking that the offense of murder in the first degree be taken from the consideration of the jury.

36 3. The court erred in overruling defendant's motion dictated in the record at the close of the taking of the evidence in said cause, asking that the court direct the jury to return a verdict of not guilty.

4. The court erred in overruling defendant's motion, dictated in the record at the close of the taking of the evidence in said cause asking that murder in the first and second degree be taken from the consideration of the jury.

5. The court erred in overruling defendant's motion for continuance on account of the absence of witnesses and the absence of the duly employed counsel, and forcing defendant to go to trial.

6. The Court erred in instructing the jury that the testimony of the absent witnesses as the same was contained in the motion for continuance and as read into the record, was not admitted by the prosecution as being true, when the prosecution refused to grant a continuance on the grounds of said absent witnesses.

7. The court erred in permitting the prosecution to read the motion for continuance to the jury as an affidavit and a confession of defendant.

8. The court erred in admitting in evidence the alleged confession of defendant made to Elizardo Quintana while under duress and in prison and which said confession was not in writing and not sworn to.

9. The court erred in admitting in evidence the portion of the skull of deceased which was offered by the prosecution, which said skull did not show all of the *fractions* testified to by the doctor who held the post mortem examination.

10. The court erred in overruling defendant's demurrer to the indictment.

11. The court erred in rejecting the evidence offered by defendant to prove that on the 20th day of December, 1909, deceased had been engaged in a fight in Santa Barbara and had there been

37 badly beaten up, and to prove that the deceased was a violent person and a vicious character, all of which was known to the defendant.

12. The court erred in rejecting defendant's evidence offered to prove that the deceased a short time prior to his death and on the same night had made a violent assault upon an Indian, in the presence of deceased.

13. That the court erred in many respects and instances as to the admission and rejection of evidence, all of which is apparent upon the record in said cause, which has not yet been transcribed.

14. That the court erred in instructing the jury "malice should be implied when no considerable provocation appears, or when all the circumstances of the killing show a wicked and malignant heart," for the reason that malice should not be implied, but may be implied.

15. The court erred in instructing the jury as to murder in the

first degree as contained in the sixth instruction, for the reason that there is no evidence in said cause to support a verdict of murder in the first degree if the jury should return one and that the court by instructing the jury as to murder in the first degree presented to the jury for its consideration a false issue, thereby prejudicing the said defendant before the said jury.

16. The court erred in instructing the jury as follows: "As to venue, that is whether or not the deceased was assaulted and died in this county of Taos, I charge that while you must find that said assault was committed and the deceased died in this county of Taos, yet it is not necessary that these facts be established by the evidence beyond a reasonable doubt, but it is sufficient if these facts are established by a preponderance of the evidence, that is by the greater weight of the evidence," for the reason that said instruction is
38 not the correct law and for the further reason that the said instruction is in conflict and contradictory to other instructions and thereby creates and causes a doubt in the prejudice of the defendant.

17. The court erred in instructing the jury as follows: "A person is not compelled to flee when attacked by another armed with a deadly weapon if by fleeing he puts himself in greater danger than he would by standing his ground and defending himself, but before he can justify a homicide the attack must have been so imminently perilous that the person attacked has no convinient or reasonable mode of retreat." As the same is contained in the seventeenth instruction, for the reason that the same is not the correct law, and the court further erred in the said seventeenth instruction in that the said instruction is too broad and does not limit the conditions under which the jury can find the defendant guilty of murder in the first degree.

18. The court erred in instructing the jury, "Bearing in mind these definitions and explanations, the court charges you that if you believe from the evidence beyond a reasonable doubt that on the 29th day of December, A. D., 1909, in this county of Taos, and Territory of New Mexico, defendant did make an assault upon said Juan Trujillo with a certain weapon, commonly called a quirt, the handle of which was then and there loaded with iron, which the defendant than and there had and held in his hands, thereby then and there inflicting in and upon the head of the said Juan Trujillo, a mortal wound, of which mortal wound, he, the said Juan Trujillo, thence continually languished until on the 30th day of December, A. D., 1909, he there died, and that such striking, beating and killing was done unlawfully, maliciously, wilfully, deliberately, premeditatedly and from a deliberate and premeditated design in a cool state of mind unlawfully and maliciously to effect the death of the said Juan Trujillo and was done without excuse or justification, then you should find the defendant guilty of murder in the first degree
39 as charged in the indictment." For the reason that the said instruction is too broad and does not limit the condition under which the jury should find the defendant guilty of murder in the first degree, to the proof of the material allegations of the indict-

ment, nor does it require that the material allegations of the indictment be all proved.

19. The court erred in instructing the jury on voluntary manslaughter as contained in the fourteenth instruction for the reason that a murder indictment does not charge the crime of manslaughter.

20. The court erred in instructing the jury as to manslaughter as in the fifteenth instruction for the reason that a murder indictment does not charge the crime of manslaughter and for the further reason that the said instruction does not present the law correctly.

21. The court erred in instructing the jury as to manslaughted as contained in the sixteenth instruction for the same reasons contained in the last error assigned.

22. The court erred in instructing that the defendant should retreat, as contained in the seventeenth instruction given, for the reason that a person when attacked is never compelled to retreat, but may stand his ground and fight back repelling force by force and is not compelled to weigh his changes of retreat as against his chances in the conflict before he be entitled to fight back and defend himself.

23. The court erred in instructing "That the defendant could not have avoided the combat without danger to his life or great bodily harm to him" as conditions presedent to a defendant availing himself of the plea of self defence, for the reason that the same are contrary to law.

24. The court erred in instructing the jury as to the different forms of verdict as contained in the twenty-ninth instruc-
40 tion for the reason that the forms of verdict presented to the jury as to murder in the first degree and as to manslaughter are improper verdicts to be presented to the jury and stand unsupported by any evidence in the case.

25. The court erred in refusing to instruct the jury on certain instructions asked by defendant and filed with the Clerk of the Court, and which are by the court marked "refused" for the reason that such instructions so asked to be given by the defendant were correct and proper instructions and such instructions as defendant is legally entitled to.

(Signed) C. C. CATRON,
Attorney for Defendant.

Endorsement: No. 1013. In the District Court, County of Taos. Territory of New Mexico, vs. Benito Lovato—Motion for New Trial and in Arrest of Judgment.—Filed in Open Court, First Judicial District, May 27th, 1911. Edw. L. Safford, Clerk.—Catron & Catron Attorneys for Defendant, Santa Fé, N. M.

Be it further remembered that on the 25th day of May, A. D. 1911, there was filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico, within and for the County of Taos, Instructions asked for by defendant, which said instructions asked for by defendant *is* in words and figures as follows:

The burden of proof is upon the prosecution and it must prove

each and every material allegation of the indictment, beyond a reasonable doubt, and if after considering the evidence there exists a reasonable doubt in your mind as to any material allegation of the indictment, you must resolve such doubt in defendant's favor, and return a verdict of not guilty. (Given in part and refused in part, (Signed) Merritt C. Mechem, Judge.)

41 The defendant is presumed to be innocent until his gu-lt is established by the evidence to your satisfaction beyond a reasonable doubt. To the benefit of this presumption the defendant in this case is entitled, and it stands as his sufficient protection until it has been removed by facts establishing his guilt beyond a reasonable doubt.

A reasonable doubt is such a doubt as would cause a reasonable and prudent man in the graver and more important affairs of life to pause and hesitate upon the truth of the matters charged. But a reasonable doubt is not a mere possibility of innocence, nor a caprice, shodow or speculation as to innocence, not arising out of the evidence or the want of it. The jury should patiently and dispassionately weigh and consider of common sense and judgment as reasonable men. And if, after considering all the evidence, you can say that you have an abiding conviction of the truth of the charge then you are satisfied beyond a reasonable doubt.

The court instructs the jury, that you may consider in determining as to whether defendant had reasonable grounds of belief that he was in em-inent danger of death or great bodily injury from the deceased, the relative size of body and strength of defendant and deceased, the knowledge defendant has as to deceased being a vicious person, and the probability of deceased carrying out his attack and inflicting great bodily injury to defendant. (Refused. (Signed) Merritt C. Mechem, Judge.)

You are the sole judges in this case of the credibility of the witnesses and the weight to be given to their testimony, and for that purpose you may consider the fairness or unfairness, the prejudice, bias or interest in the result of your verdict, if any of any witnesses who has testified before you, his demeanor while testifying, his apparent carefulness and fairness on the stand, his opportunity
42 to know and correctly relate the facts and whether his testimony is positive or negative in character and determine from the whole of the evidence where the truth in the case lies.

If you believe any witness has knowingly and wilfully testified falsely upon any material point in issue in this case, you will be at liberty to disregard all or any portion of his testimony unless the same is corroborated by other competent evidence in the case which you believe to be true.

The court instructs the jury that if you believe from the evidence, that the deceased went in search of defendant for the purpose of attacking him, and did find him and attack him with a rock and struck him, in the head with the rock, and attempted to strike a second time with the rock, and defendant in defending himself struck deceased in the head with a loaded quirt, which resulted in the death of the

deceased, in law the killing is excusable, on the ground of self-defense, and in that event it will be your duty to acquit defendant. (Given in part and refused in part. (Signed) Merritt C. Mechem, Judge.)

Endorsement: No. 1913.—In the District Court, County of Taos,—Territory of New Mexico, vs. Benito Lovato,—Instructions asked for by defendant—Filed in Clerk's Office, First Judicial District, May 25th, 1911, Edw. L. Safford, Clerk.

Be it further remembered that at a regular term of the District Court of the First Judicial District of the Territory of New Mexico, within and for the County of Taos, begun and held on the first Monday in May 1911, and on the fifth day of the adjourned May Term, the same being Friday, May 26th, 1911, the following among other proceedings were had and entered of record, to-wit:

No. 1013. Criminal.

TERRITORY OF NEW MEXICO
vs.
BENITO LOVATO.

Murder.

This cause coming on for hearing this day in open court
43 upon the motion of the defendant for a new trial and in arrest of judgment, the plaintiff appearing by her District Attorney E. C. Abbott, Esq., and her special prosecutor A. B. Renehan, Esq., and the defendant appearing in his own proper person attended by his counsel, C. C. Catron, Esq., whereupon the court hears the motion for a new trial read, the arguments of counsel for and against said motion, and being otherwise sufficiently advised in the premises overrules the same, to which ruling of the court the defendant by his counsel then and there excepts.

And not the court hears the motion in arrest of judgment read, the arguments of counsel for and against said motion, and being otherwise sufficiently advised in the premises overrules the same, to which ruling of the court the defendant by his attorney then and there excepts.

Be it further remembered that at a regular term of the District Court of the First Judicial District of the Territory of New Mexico, within and for the county of Taos, begun and held on the First day of May, A. D., 1911, and on the sixth day of the adjourned May Term, the same being *the* Saturday, May 27th, 1911, the following among other proceedings were had and entered of record, to-wit:

No. 1013. Criminal.

TERRITORY OF NEW MEXICO
vs.
BENITO LOVATO.

Murder.

Comes now the plaintiff in the above entitled cause by her District Attorney, E. C. Abbott, Esq., and comes now the defendant, Benito Lovato, in his own proper person, attended by his counsel C. C. Catron, Esq., the defendant, Benito Lovato, being first asked by the court if he has anything to say why the judgment and sentence of the court should not be passed upon him says naught: It is therefore considered, ordered, adjudged and decreed that the
44 judgment and sentence of the court is that you Benito Lovato, be remanded to the custody of the Sheriff of the County of Taos, territory of New Mexico, to be by him safely kept until such time as he can conveniently convey you to the New Mexico Penitentiary, situate at Santa Fé, Santa Fé County, New Mexico, and that you be there conveyed and delivered to the Superintendent or Warden thereof, and that you be therein confined at hard labor for the full period of not less than seven years nor more than ten years from this date and that you pay the costs of this prosecution herein to be taxed.

Thereupon attorney for defendant moves the court that he be granted leave to appeal to the Supreme Court of the Territory of New Mexico; whereupon the court being sufficiently advised in the premises, it is ordered that said defendant be granted leave to appeal. It is further ordered that said defendant furnish a supersedeas bond in the sum of Five Thousand Dollars ($5,000), said bond to be approved by the clerk of this court.

Be it further remembered that on the 27th day of May, A. D. 1911, there was filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico, within and for the County of Taos, a Motion for appeal which said motion for appeal is in words and figures as follows to-wit:

In the District Court of the First Judicial District, Sitting in and for the County of Taos, Territory of New Mexico.

No. 1013.

TERRITORY OF NEW MEXICO
vs.
BENITO LOVATO.

Appeal.

Comes now the defendant and by leave of the court takes this appeal from the judgment, verdict and sentence in the above en-
45 titled cause, to the Supreme Court of the Territory of New Mexico, and asks that the app-al bond and supersedeas be by the court fixed in the sum of Five thousand dollars, ($5,000).

(Signed) C. C. CATRON,
Attorney for Defendant.

Endorsement: No. 1013—In the District Court, County of Taos—Territory of New Mexico, vs. Benito Lovato—Appeal—Filed in open court first judicial district, May 27th, 1911, Edw. L. Safford, Clerk.—Catron & Catron, Attorneys for Defendant, Santa Fé, N. M.

Be it further remembered that on the 27th day of May, A. D. 1911, there was filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico, within and for the county of Taos, an appeal bond, which said appeal bond is in words and figures as follows, to-wit:

In the District Court of the First Judicial District, Sitting in and for the County of Taos, Territory of New Mexico.

No. 1013.

TERRITORY OF NEW MEXICO
vs.
BENITO LOVATO.

Appeal Bond.

Know all men by these presents that we, Benito Lovato, as principal, and Esquire Hartt, Jr., Malaquias Martinez, Severiano Martines, Antonio B. Trujillo, Jose Montanier, Juan B. Ortega, Demostenes Martines as sureties, are held and firmly bound unto the Territory of New Mexico, in the penal sum of Five Thousand Dollars for the payment of which well and truly to be made, we bind ourselves jointly and severally, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 27th day of May, 1911.

46 The condition of the above and foregoing obligation is such that whereas the above bounded principal Benito Lobato, has been convicted in the district Court of the First Judicial District of the Territory of New Mexico, within and for the County of Taos of the crime of voluntary manslaughter, on a charge of murder, and sentenced to the penitentiary, and the defendant feeling himself aggrieved by the said verdict and judgment of the court, has taken his said appeal to the Supreme Court of the Territory of New Mexico to there further prosecute his said defense.

Now, Therefore, if the said Benito Lobato shall prosecute his said appeal with due diligence and effect and without delay and shall abide by the judgment of the Supreme Court of the Territory of New Mexico, and obey all orders of the said court and pay all costs which may be legally adjudged against him, then and in that event the foregoing obligation shall be null and void, otherwise to remain in full force and effect.

(Signed)	BENITO LOVATO.
(Signed)	ESQUIRE HARTT, JR.
(Signed)	MALAQUIAS MARTINEZ.
(Signed)	SEVERIANO MARTINEZ.
(Signed)	ANTONIO B. TRUJILLO.
(Signed)	JOSE MONTANER.
(Signed)	JUAN B. ORTEGA.
(Signed)	DEMOSTENES MARTINEZ.

TERRITORY OF NEW MEXICO,
County of Taos:

On this 27th day of May, 1911, before me the undersigned officially personally appeared Benito Lovato, Esquire Hartt, Jr., Malaquias Martinez, Severiano Martinez, Antonio B. Trujillo, Jose Montaner, Juan B. Ortega, Demostenes Martinez, and each for himself and not one for the other severally acknowledged to me that he executed the foregoing bond as his act and deed.

47 In Witness Whereof I have hereunto set my hand and seal this day and year first above written.

[SEAL.] (Signed) EDW. L. SAFFORD, *Clerk.*

TERRITORY OF NEW MEXICO,
County of Taos:

Squire Hartt, Jr., Malaquias Martinez, Severiano Martinez, Antonio B. Trujillo, Jose Montaner, Juan B. Ortega, Demostenes Martinez, sureties upon the above and foregoing bond, having been duly sworn in accordance with law, depose and say, each one for himself and not one for the other that he is worth in property situate within the Territory of New Mexico the amount set opposite unto his name

and signature below, over and above all just debts and liabilities and the amount exempt by law from execution and forced sale.

SQUIRE HARTT, JR.....	$500.00
MALAQUIAS MARTINEZ...	$2,000.00
SEVERIANO MARTINEZ..	$500.00
JOSE MONTANER.....	$1,000.00
JUAN B. TRUJILLO.....	$500.00
DEMONTENES MARTINEZ.	$500.00
ANTONIO B. TRUJILLO....	$1,000.00

Subscribed and sworn to before me this 27th day of May 1911.
[SEAL.] (Signed) EDW. L. SAFFORD.

Endorsement: No. 1013—Filed In Open Court First Judicial District May 27th, 1911. Edw. L. Safford, Clerk.

Be it further remembered that on the 2nd day of October, 1911, there was filed in the office of the clerk of the District Court of the First Judicial District of the Territory of New Mexico, within and for the County of Taos, a motion for additional time to perfect appeal, which said motion for additional time to perfect *time* is in words and figures as follows, to-wit:

48 In the First Judicial District Court in and for the County of Taos, Territory of New Mexico.

TERRITORY OF NEW MEXICO
vs.
BENITO LOBATO.

Murder.

Petition.

Comes now the defendant in the above entitled cause by his attorneys, Catron & Catron, and respectively represents to the court as follows:

That heretofore, at the May 1911 Term of court in the County of Taos, the above entitled cause was tried before a jury and a verdict of guilty rendered. That therefore the defendant, through his attorneys, filed a motion for arrest of judgment and for a new trial in said cause, which said motion for arrest of judgment and for a new trial was overruled by the Court, whereupon the said defendant prayed that he be granted an appeal to the Supreme Court of the Territory of New Mexico, which said appeal was thereupon granted by the court, at the time within which the defendant must prepare his transcript of the record in said cause has not yet expired, and although the defendant has ordered a transcript to be prepared by the stenographer, he has been informed by said stenographer of the court, as more fully appears by her letter hereto

attached, that it will be impossible for her to prepare the same so that the same may be a part of the bill of exceptions of said cause within the time allowed by law.

Wherefore, in consideration of the premises your petitioner respectively prays that the court grant him an extension of ninety days time in which to prepare for signing, settling and sealing his bill of exceptions in the above entitled cause upon his appeal to the Supreme Court of the Territory of New Mexico.

(Signed) CATRON & CATRON,
Attorneys for Defendant.

9/26/1911.

49 C. C. Catron, Esq., Santa Fe, N. M.

DEAR SIR: Owing to the fact that I will be busy the balance of this month in court, and as I have several orders for transcripts ahead of yours, it will be impossible for me to get out the transcript in this case of Territory of New Mexico vs. Benito Lovato, Taos County, before the first of December.

Yours truly,
(Signed) M. C. McNITT,
Official Stenographer First District.

Endorsement: No. 1013—In the District Court, County of Taos,—Territory of New Mexico, Plaintiff vs. Benito Lovato, Defendant,—Motion—Filed in Clerk's Office First Judicial District Oct. 2 1911. Edw. L. Safford, Clerk.—Catron & Catron, Santa Fé N. M. Attorneys for defendant.

Be it further remembered that on the 2nd day of October, A. D., 1911, there was filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico, within and for the County of Taos, an order of the Court allowing additional time to perfect appeal, which said order is in words and figures as follows, to-wit:

In the First Judicial District Court in and for the County of Taos, Territory of New Mexico.

TERRITORY OF NEW MEXICO
vs.
BENITO LOVATO.

Murder.

This cause coming on to be heard upon the foregoing petition and the exhibit thereunto attached, and the Court having considered the same, and heard counsel, it is, therefore,

50 Ordered, Considered and Adjudged, that the defendant do have and he is hereby granted an extension of ninety days within which to prepare for settling, signing and sealing his bill

of exceptions in the above entitled cause, upon his appeal to the Supreme Court of the Territory of New Mexico.

(Signed JOHN R. McFIE,
Judge of the First Judicial District Court, etc.

Sept. 30, 1911.

*W*ndorsement: No. 1013, Taos County,—Territory of New Mexico, vs. Benito Lovato,—Order—Filed in Clerk's Office First Judicial District, Oct. 2, 1911. Ed. L. Safford, Clerk. R. D. P. 102.

In the District Court of the First Judicial District of the Territory of New Mexico, within and for the County of Taos.

No. 1013.

TERRITORY OF NEW MEXICO
vs.
BENITO LOVATO.

Criminal—Murder.

I, Edward L. Safford, Clerk of the District Court of the First Judicial District of the Territory of New Mexico, within and for the County of Taos, do hereby certify that the above and foregoing pages of typewriting contain a true, correct and complete transcript of the record and proceedings, as called for by the præcipe immediately following the index hereof, and of the bill of exceptions as signed by the Judge of the said Court, in the above entitled cause as the same remains on file and of record in my office.

In Witness Whereof I have hereunto set my hand and the seal of the said District Court at my office in the City and County of Santa Fé, Territory of New Mexico, this 9th day of December, A. D., 1911.

[SEAL.] EDW. L. SAFFORD, *Clerk.*

51 Be it further remembered, that in the record of the above eititled cause, at page 162, upon the conclusion of the testimony by the Territory, and the Territory having rested, the following motion appears therein at pages 162 and 163 of the said record said motion and order and exception, preceding the examination of any witnesses in behalf of the defendant.

By Mr. Catron: Comes now the defendant and moves the court to instruct the jury to find a verdict of not guilty and for reasons of such motion states:

1. The indictment charges that defendant struck the deceased in and upon the top of the head with a loaded quirt, thereby inflicting a mortal wound, when in truth and in fact the evidence shows that the deceased was not *d*truck in and upon the top of the head, and did not receive a mortal wound in and upon the top of

the head, and further because the evidence fails to show that defendant struck the deceased on the head with a loaded quirt, and further that there is no proof as to any inflicted or mortal wounds on the front and back side of the head of the deceased.

2. That the Territory has failed to prove the material allegations of the indictment.

3. That the record of the court shows former jeopardy in that it shows that a jury had, prior to this trial, been duly called, empaneled and sworn to try this case and the charge contained in the said indictment, and that thereafter the jury was dismissed.

4. That the evidence is confusing, contradictory and conflicting and leaves a doubt as to what or who caused the death of the deceased.

52 5. Because the evidence of the Territory shows that defendant acted in self defense.

Motion overruled. Defendant excepts.

And thereafter at pages 211 and 213 of the said record and at the conclusion of the evidence on behalf of the defendant and rebuttal on behalf of the state and behalf of the defendant the following motion appears to-wit:

By Mr. Catron: I desire to renew the motion I made before, the same motion identically in both cases. The last one was to withdraw murder in the first and second degrees in this case, for the reason that there is no evidence to support them and the matter was the result of a quarrel and fight.

Motion overruled. Defendant excepts.

And heretofore, on to wit, at a regular term of the Supreme Court of the State of New Mexico, begun and held at Santa Fe, the seat of Government, on the Second Wednesday in January, A. D., 1913, the same being Wednesday, January 8th, A. D., 1913, on the twenty-first day of the said term, the same being Friday, March, 21st, A. D., 1913, the following among other proceedings were had and entered of record, to wit:

No. 1542.

TERRITORY OF NEW MEXICO, Appellee,

vs.

BENITO LOVATO, Appellant.

Appeal from District Court, Taos County.

This cause coming on for hearing upon the transcript of record, assignment of errors, and briefs of counsel, was by stipula-
53 tion of counsel, submitted to the court on briefs, and the court not being sufficiently advised in the premises takes the same under advisement.

And afterwards, on towit: on the fieftieth day of the said regular term, the same being Friday, May 9th, A. D., 1913, the following among other proceedings were had and entered of record towit:

No. 1542.

TERRITORY OF NEW MEXICO, Appellee,
vs.
BENITO LOVATO, Appellant.

Appeal from District Court, Taos County.

This cause having been argued by counsel, submitted to and taken under advisement by the court, upon a former day of the present term, and the court being now sufficiently advised in the premises, announces its decision by Chief Justice Roberts, Justices Hanna and Parker concurring, affirming the judgment of the court below, for reasons stated in the opinion of the court on file; It is therefore considered and adjudged by the court that the judgment of the District Court in and for the County of Taos, whence this cause came into this court, be and the same hereby is affirmed, and that in accordance therewith, It is considered and adjudged by the court that the said Benito Lovato be and he hereby is remanded to the custody of the Sheriff of the County of Taos, to be by him safely kept until such time as he can conviently convey him to the State Penitentiary situated at Santa Fé, New Mexico, and that the said Benito Lovato, be therein delivered to the Superintendent or Warden of the New Mexico Penitentiary, to be therein confined at hard labor for the full period of not less than seven years nor more than ten years from date of delivery, and that he pay the costs of this prosecution to be taxed, for which let execution issue.

54 And afterwards, on towit, on the 26th day of May, A. D., 1913, there was filed in the office of the Clerk of the Supreme Court of the State of New Mexico, a motion for rehearing in the above entitled cause, which said motion for rehearing, was and is in the following words and figures to wit:

In the Supreme Court of the State of New Mexico, January Term, A. D., 1913.

No. 1542.

TERRITORY OF NEW MEXICO, Appellee,
vs.
BENITO LOVATO, Appellant.

Appeal from District Court, Taos County.

Comes now the Appellant, Benito Lovato, by his attorneys of record, and respectfully moves the court to grant him a re-hearing in the above entitled cause, on the following grounds and for the following reasons, to-wit:

1. That the court improperly and contrary to the law and practice decided that the indictment on which the defendant was tried and convicted alleged an assault, a mortal wounding of the deceased and that the deceased died of such wounds within a year and a day, and that the demurrer filed by the defendant to such indictment was properly overruled by the lower court.

2. That the court improperly and contrary to the law and practice decided that the lower court did not err in refusing to direct a verdict of "not guilty" for the defendant upon the ground of former jeopardy, this court basing such decision on the ground that the question of former jeopardy had not been raised in the lower court by special plea in bar, and therefore it was unnecessary to determine whether or not the defendant had once been placed in jeopardy, and this court improperly and contrary to law and
55 practice decided such question because the question of raising such former jeopardy by special plea in bar was not made nor raised by the defendant nor by the attorney general, nor were arguments thereon made either by the defendant or the Attorney General by brief or otherwise, nor did this court request arguments thereon either by brief or otherwise, nor did the defendant have the opportunity to raise such question or argue the same, and for the further reason that the court over-looks the fact that where the facts of former jeopardy appear upon the record and where both the court and the jury witnessed the former trial and the facts making up the same and both were constantly present thereat, the question of former jeopardy became and then was solely and purely a question of law for the court, and not a question of fact for the jury, and was amply brought to the attention of the lower court. That this question is decisive of the case now presented to this court. That had defendant the slightest reason to believe that this court would take up for consideration the method of raising the former jeopardy he would have instantly argued said question before this court and would have supplied this court with ample authority to sustain his position thereon.

3. That the court erred in deciding the question of former jeopardy on the ground that it had not been raised according to the common law practice and decision, for the reason that the question of former jeopardy in the case at bar was wholly a question of law for the court, which could not have been decided by the jury, and because the motion made by defendant raising said question was recognized by the lower court as a question of law by the lower court making its decision thereon; that the decision of the court on this point is in conflict with authority, because the question falls within an exception to the authorities cited by the court sustaining its position on this question, because the central idea in raising the question of former jeopardy by special plea is to enable the
56 court and jury to have an opportunity to pass on the question of law and fact involved, and because the question of former jeopardy in this instance presented no question of fact for the jury but solely a question of law for the court, and the court had ample

time, means and facilities to correct itself on said question by having that question called to its attention by the motion aforesaid.

4. That the court contrary to law and practice decided that the motion made by defendant for a directed verdict of "not guilty" did not raise the question of former jeopardy, because notwithstanding — what legal technical name the defendant sought to raise the question of former jeopardy it appears that the so called motion for directed verdict raised and called to the court's attention all essential and material matters that a special plea in bar of former jeopardy ordinarily raises and a distinction in the technical names of pleadings cannot deprive this defendant of his constitutional rights; that therefore the question of jeopardy became a question decisive of this cause for this court to determine, and the question was duly submitted, as a question of former jeopardy, for the determination of this court, and the decision of the court thereon is in conflict with the authority of decisions thereon.

5. That the court, contrary to law and practice decided that the so called motion of defendant for a directed verdict of not guilty for defendant did not raise the question of former jeopardy, because the majority of decisions cited by this court as sustaining its position on that question were based on state statutes defining the number and kinds of pleas, included in which was the "plea of former jeopardy", and therefore those decisions were of no importance in deciding the question at bar.

5. That the court, contrary to law and practice, decided the question last aforesaid because the practice and decisions prevailing at common law do not apply in a decision of the question at bar, because Section 1049 of the Compiled Laws of 1897 of the
57 State of New Mexico, to which the attention of this court has been heretofore called, because of the oversight on the part of defendant's counsel, authorizes and permits the question of former jeopardy to be raised by a "pleading" of such former jeopardy by him "in bar"—and the so called motion, which included all the matters essential to a plea in bar, in view of the fact that the former jeopardy in the case at bar included questions of law, as distinguished from questions of fact, was a "pleading" and was directed to the merits of the case at bar, and was "in bar" as distinguished from a dilatory plea.

7. The court, contrary to law and practice, decided that "There is nothing in the record to show but that such jury was selected in the manner required by law * * *" in that the law, as laid down by the highest court of the land in the case of Coffin vs. United States, 156 U. S. 452, is that the record must affirmatively show all and every step and steps necessary to a valid trial and verdict, and not that there is nothing in the record to show the invalidity.

8. The court, contrary to the law and practice, decided the question in the last paragraph mentioned, because the court in its opinion says:

"Thereafter the record shows that the same twelve jurors first empaneled were placed in the box, and shows that said jurors were

sworn, but it is not plain as to whether the record intends to show that such jurors were re-sworn after the second formal arraignment and plea of the defendant, or whether it is attempting to recite the fact that such jurors were sworn to their dismissal theretofore, as recited."

which, by the very own words of this court, shows that the court is in serious doubt as to just what the record does recite, and that doubt may be resolved by holding that the jury was twice sworn in the same cause, (an unheard of thing to say the least unusual) or that the jury was sworn after they had oncce been dismissed and
58 recalled. This is contrary to the law and practice in that the law says that the court shall not indulge in presumptions, but that the record must affirmatively show all and every step necessary to a valid trial and verdict. Coffin vs. U. S. Supra.

9. That the court, contrary to law and practice, decided that the lower court properly over-ruled defendant's motion for a continuance, because this court over-looks the material facts that T. B. Catron was the only attorney the defendant had, and that C. C. Catron was disqualified to act as defendant's attorney, although a member of the firm, for the reason that he had been in charge of the Grand Jury which found and presented the indictment against defendant, and had, during that time been acting in the capacity of District Attorney and had prepared the indictment on which defendant was tried and convicted, and because all the cases cited by the appellee and the court on this proposition are distinguished from the one at bar, in that in all of those cases there was more than one attorney employed by the defendant or more than one member of the firm which had been employed by defendant, only one of which was absent or unable to attend court, in none of which cases the other attorney was absolutely disqualified to represent the defendant, as in the case at bar, which is a fact material to this question which the court apparently over-looks.

10. (Leaving the regular order, which would be the question involving instructions, and passing to the next ground, but asking that the court give eseecial attention to the matter of instructions hereinafter raised we proceed)

That the court, contrary to the law and practice, decided that the lower court did not err in not permitting evidence of specific acts of the deceased, showing that he was a bad, vicious and dangerous character, and that the defendant, at the time of the assault, knew these facts, Because the decision is based upon the case of Dens-
59 more v. United States, 12 N. M. 105, wherein it approves the rule laid down by Greenleaf on Evidence, that:—

"The rule of proving similar offenses is only admissible for the purpose of proving knowledge or intent, or where the crime charged in the indictment is so linked with some other crime, that in proving one, the same evidence would prove the other."

which is the exact theory upon which the proof was offered, to-wit to prove the knowledge of defendant of the unlawful acts of the

deceased, so that the jury would see whether the force used by the defendant in repulsing the unlawful attack made upon him by the deceased was a proper use of such power, under the instructions of the court. The Densmore case upholds our theory of the law on this proposition, and does not later therein over-ride it by holding that the specific acts mentioned were inadmissible of a certain state of conditions of deceased, to show his traits when under the influence of liquor, and is limited to that condition by the facts of the case. The bro-der proposition of showing specific acts of deceased in his relations wich men, known to defendant at the time of the assault, under ordinary conditions, was not passed upon, though some alleged authority was cited, but the Densmore case stands as obiter dicta so far as our precise point is concerned. This is manifestly clear, else the court would not have seen fit to approve the rule cited and laid down by Greenleaf, for it could not consistently do that and hold adverse to our contention as raised in this point. That the overwhelming weight of authority, and the modern rule of all the courts, is, that such acts are admissible and are directly opposed to the rule laid down by this court, under the misapprehension and misapplication of the law aforesaid. The offer of such testimony would have developed so that the jury would have seen that the defendant knew, had knowledge of and was aware of the characteristics of violence of the deceased, which would rightly put the defendant on
60 his guard when attacked by such a vicious character.

11. The court, against and contrary to the law and practice, decided that the portion of the skull admitted in evidence by the lower court was properly admitted because the examination of a portion of the skull without the whole skull prevented the jury from intelligently passing judgment on the nature of the mortal wound and prejudiced the defendant thereby.

12. That the court, contrary to law and practice, decided, that the lower court did not err in admitting the conversation between the Sheriff and the defendant had in the jail, which tended to be in the nature of a confession, because the court, apparent from a reading of its decision on this point, over-looks the fact that the question of the admission of the conversation was pertinent only at the time it was given, and, notwithstanding, what the defendant may, or may not, have testified in reference thereto the question remains, "Was it admissible at the time it was tendered?" The decision is in conflict with the general rule of law, well established by a multitude of authorities, that a confession is prima facie involuntary, and until its voluntary character is established it is inadmissible. At the time it was given it was not established as voluntary. What transpired after the ruling of the court on the question of the admissibility of the confession, even were we to admit that the defendant thereafter affirmed the e-act details of the alleged conversation in the nature of a confession, could in no manner affect the question at bar. To attempt such reasoning would simply beg the question. The test of the admissibility of the alleged confession is, was it admissible at the time it was offered and objected to. The record showing no foundation laid for its admission, its offer, objection

thereto and the admission of such conversation in the nature of a confession, makes prima facie a case of error.

13. That the court, contrary to law and practice decided that it would not consider the errors claimed by defendant to exist
61 in the giving and refusing to give of certain instructions, because, first, the paper containing the exceptions to the instructions filed two days subsequent to the date the instructions were given was filed with the permission of the court, and the questions therein raised were subsequently called to the attention of the court by the motion for a new trial, and overruled, and second, because the decision therein in this case was erroneously based on the case of Eaker vs. Territory, reported in Volume 2 of the advance sheets of 131 Pacific Reporter. The Eaker case was based on prior decisions of this court, under the impression that those prior decisions were the law of the State, whereas all of such decisions were not the law of this State nor precedents for this court, for the reason that those decisions were rendered when this State was a Territory, and all courts of the United States were superior to this court as then constituted and the governing authority and decusion directly bearing on the question at bar was made in the case of Territory of New Mexico against Antimo Pettine, reported in Advance sheet No. 3 of Vol. 201 Federal Reporter, at page 496 and 497, wherein it was held that the court could and would notice grave errors in the trial of a defendant, although the questions they presented were not properly raised, which decision overruled all decisions of the Supreme Court of the Territory of New Mexico theretofore rendered, so that the Eaker case, being based on those overruled decisions cannot be said to be of any weight in the cause at bar, and is opposed to the weight of authority: that it is the duty of the trial court, under the laws of New Mexico, to fully instruct on All of the law governing the case, and when the court instructs on matters which are not law, or not correct law, the statute has not been complied with, and no good or sound reason exists why the failure to take exceptions to such instructions should cure the wrongful act of the court, and give to the jury incorrect law on which to find their conclusions. That these exceptions in the case at bar, notwithstanding when filed,
62 became a part of the record, by the law, by their incorporation into the motion for a new trial, and are therefore properly before the court. This reasoning likewise applies to the instructions asked for and refused.

Wherefore, defendant prays that a re-hearing may be granted and that counsel for defendant may be permitted to file briefs in support of this motion and that, because of the necessary absences of defendant's counsel from the City attending terms of court an extended period of time may be had in which to file said briefs.

Respectfully submitted,

CATRON & CATRON,
Attorneys for Defendant.

And afterwards, on towit, *on* the Seventieth day of the said regular term of the said Supreme Court of the State of New Mexico,

the same being Monday, July 21st, 1913, the following among other proceedings were had and entered of record, towit:

No. 1452.

TERRITORY OF NEW MEXICO, Appellee,
vs.
BENITO LOVATO, Appellant.

Appeal from District Court, Taos County.

This cause having been heretofore submitted to the court upon a motion of the appellant for a rehearing herein, and the Court being now sufficiently adbised in the premises, announces its decision by Chief Justice Roberts, Justices Hanna and Parker, concurring, denying the motion for rehearing. It is therefore considered and adjudged by the court that the motion of appellant for a rehearing herein, be and the same hereby is denied.

63 And afterwards, on towit, *on* the Eighty-second day of the said Regular term, of the Said Supreme Court of the State of New Mexico, there was had and entered of record, the following proceedings towit:

No. 1452.

TERRITORY OF NEW MEXICO, Appellee,
vs.
BENITO LOVATO, Appellant.

Appeal from District Court, Taos County.

The above entitled cause and matter coming on to be heard upon the petition of petitioner for the allowance of a writ of error from the United States Circuit Court of Appeals for the Eighth Circuit, to the Supreme Court of the State of New Mexico, and upon examination and inspection of said petition and matter therein contained, and desiring to give petitioner an opportunity to present in the United States Circuit Court of Appeals the questions presented by the record in said matter. It is ordered that a writ of error be and the same is hereby allowed to this Court from the United States Circuit Court of Appeals, and that a Bond presented by said petitioner, be and the same hereby is approved.

And heretofore, on towit, *on* the 9th day of May, A. D. 1913, there was filed in the office of the Clerk of the Supreme Court of the State of New Mexico, an opinion by the court in the above entitled cause, which said opinion was and is in the following words and figures towit:

64 In the Supreme Court of the State of New Mexico, January Term, A. D. 1913.

No. 1452.

TERRITORY OF NEW MEXICO, Appellee,
vs.
BENITO LOBATO, Appellant.

Appeal from District Court, Taos County.

Syllabus by the Court.

1. An indictment for murder in the first degree, in other respects sufficient, which concludes in the following language, "did strike and beat the said Juan Trujillo, giving to him, the said Juan Trujillo, in and upon the top of the head of him the said Juan Trujillo, one mortal contusion, bruise, fracture, and wound, of which the said mortal wound, the said Juan Trujillo thence continually languished until, on the 30th day of December, A. D. 1909, between the hours of two and three O'clock in the morning of said day, he there died," charges that the deceased died of the mortal wounds alleged to have been inflicted by the defendant.
2. The common law, adopted by statute in this state as the rule of practice and decision, in criminal cases, required the defense of former jeopardy to be specially pleaded, and such defense is not admissible under the general issue. Held, where such defense is not so pleaded, it cannot be raised by motion, upon the conclusion of the state's case, for an instructed verdict.
3. The record in this case shows that a valid jury was empaneled to try defendant.
4. The granting or denying of a motion for continuance is within the discretion of the trial court, and unless such discretion
65 has been abused, to the injury of the defendant, the denial of such motion will not constitute error.
5. It is not an abuse of discretion by the trial court, to refuse to grant a continuance, where the only ground stated in the application is the absence of counsel for defendant in an adjoining county, attending court.
6. Where instructions given by the court, in a criminal case, are objectionable to the defendant, he must call the court's attention to the claimed error in such instructions, prior to, or at the time they are given, so that the court may have an opportunity to correct the alleged error; and objections filed in the clerk's office to instructions two days after the trial and verdict will not be considered.
7. The same rule applies to requested instructions which the court refuses to give. It is the duty of the defendant, if he intends to predicate error upon such refusal, to except to the action

of the court, at the terim time, in refusing to give such instructions.

8. In cases of homicide it is permissible to allow the defendant to show the general reputation of the deceased as to being a lawless and violent character, but specific acts of violence on the part of deceased may not be shown.
9. The trial court properly admitted in evidence a portion of the skull of the deceased, showing the character of one of the claimed mortal wounds, alleged to have been inflicted by the defendant.
10. Defendant can not predicate error, upon the action of the court in permitting the sheriff, who arrested defendant, to testify to an alleged conversation had with defendant, where there was no showing that such statement was made under duress, threats or promises.

66 *Statement of Facts.*

An indictment was returned against the appellant, by the grand jury of Taos County, charging him with the crime of murder in the first degree. He was tried, found guilty of voluntary manslaughter, and by the court senetnced to a term of not less than seven, nor more than ten years, in the territorial penitentiary. From such judgment, this appeal is prosecuted.

Opinion of the court.

ROBERTS, *C. J.*:

Appellant relies upon six grounds of error, for a reversal of this cause, which we will discuss in the order presented.

The first contention urged is that the court erred in overruling the demurrer to the indictment. Several grounds of demurrer were stated, but appellant here urges for consideration only the following:

"Said indictment does not charge that deceased died of the mortal wounds alleged to have been inflicted by the defendants." The same objection was also raised by motion in arrest of judgment. That portion of the indictment, necessary to set out in order that the ground of objection may be intelligently understood, reads as follows:

"did strike and beat the said Juan Trujillo, *giginv* to him, the said Juan Trujillo, in and upon the top of the head of him the said Juan Trujillo, one mortal contusion, bruise, fracture and wound, of which said mortal wound, the said Juan Trujillo thence continually languished until, on the 30th day of December, A. D. 1909, between the hours of two and three in the morning of said day, he there died."

We do not believe the language used in the indictment and quoted above, by any rule of construction, justifies the assertion that it

does not charge that the deceased died of the mortal wounds,
67 inflicted by the defendant. Briefly stated, and stripped of legal verbiage, the indictment charged that Trujillo was given a mortal wound by the defendant, "of which mortal wound" the said Trujillo "there died." It is true, the indictment alleges, after using the language "of which said mortal wound," that "the said Juan Trujillo continually languished until, on the 30th day of December, A. D. 1909, between the hours of two and three o'clock in the morning of said day," and that such language intervenes between the words "of which said mortal wounds" and "he there died," still it is all a part of one sentence, and such language simply relates what occurred between the infliction of the wounds and the death. The charge is that he died of the mortal wounds, so received, and the recital is made, that of the mortal wounds, so received, he languished, followed by a statement of the time of his death. The charge is all part of one sentence, separated only by commas, and only by a strained construction can appellant's contention be sustained.

In the preparation of this indictment the district attorney did not follow the usual approved form, and such practice is not to be commended. Such officials, by the exercise of ordinary care and prudence in drafting indictments, can avoid all questions as to the sufficient thereof. While innovations are unwise, the antagonism to them that will preclude the use of the equivalent expressions would be even more pernicious. Borrego v. Territory, 8 N. M. 446. Appellant has cited us to the following case-, which he insists hold such an indictment defective. State v. Bland, 69 Mo. 317; State v. Sundheimer, 93 Mo. 311. People vs. Jacinto, 6 Cal., 208. People vs. Wallace, 9 Cal. 31. Edmondson vs. State, 41 Tex. 496.

An examination of the cases, however, will show that the language used in the indictments therein, under consideration, was altogether different from that used in the one now before the court.

On the other hand the Attorney General has called our attention
68 to the case of Lutz vs. Commonwealth, 29 Pa. S. R. 441, where the charge that death resulted from the wounds inflicted, was not nearly so positive or direct as in the indictment in this case, and the same was upheld by that court. In the Pennsylvania case the language was as follows:

"one mortal wound, of the length of one inch and the depth of six inches, of which said mortal wound, he, the said Richard O'Leary, from the said twenty-seventh day of June, in the year aforesaid, at the county aforesaid, until the twenty-eighth day of the same month of June, in the year aforesaid, at the county aforesaid, did languish and languishing did live; on which said twenty-eighth day of June, in the year aforesaid, the said Richard O'Leary, in the county aforesaid, died:"

Speaking of this language the court there say:

"The rule undoubtedly is that an indictment for murder must expressly show that the party died of the hurt specially described and set forth; but in construing indictments we are not, whilst avoiding intendments against the life of the prisoner, to fall into

such extreme astutia as shall ignore the force and meaning of language."

The holding of the Pennsylvania court was approved by the supreme Court of Illinois in the case of Palmer vs. People, 138 Ill., 356. The Court say:

"The mortal wound was given one day, and the deceased languished or grew weaker until the next day, and died. It is clear that he died of the mortal wound given, of which he languished to death. The respective dates of the stroke and of the death are sufficiently stated. Lutz vs. Commonwealth, 29 Pa. St. 441; 2 Bishop's Crim. Proc. Sec. 528; Bishop's Directions & Forms, Sec. 520; State vs. Conley, 29 Me. 78; State vs. Haney, 67 N. C. 467; 9th A. & E. Enc. Law 646."

In the case of Tickle vs. The State, 6 Texas App. R. 623, an indictment of similar phraseology was held sufficient. The court say:

"The indictment alleges that the defendant on the 5th day of March, 1876, in the County of Navarro and State of Texas,
69 inflicted upon James Shields a mortal wound, 'of which mortal wound, he, the said James Shields, then and there languished, and afterwards, to-wit, on the 10th day of March, 1876, languishing, died.' This we think sufficiently charged that the death of Shields proceeded from the wounds."

See also U. S. vs. Ball, 163 U. S. 662.

For the reasons stated we are of the opinion that the demurrer to the indictment was properly overruled. The indictment alleged an assault and the nature thereof, the mortal wounding of the deceased, and that the deceased died of such wounds within a year and a day, and was therefore sufficient.

When defendant was first brought into court to answer the indictment in this case, he pleaded not guilty. Thereafter the record discloses that the defendant without withdrawing his prior plea, and, without leave of court first had or obtained, filed a demurrer to the indictment. No action appears to have been taken upon said demurrer until the day set for trial. Upon that day the record shows that the demurrer came on for hearing, and was overruled by the court, and the record continues:

"Whereupon both parties announced themselves ready for trial, and now comes the jury as follows, to-wit:" (followed by the names of twelve jurors, and the usual formal entry showing the empaneling and swearing of the jury.) Thereafter the record recites: Thereupon it appearing to E. C. Abbott, Esquire, District Attorney, that defendand had not been arraigned, and had not pleaded since the overruling of defendant's demurrer, upon motion, the court dismissed the jury and directed that the defendant be arraigned and plead."

This language is followed by a recital of the arraignment and plea of not guilty of the defendant. Thereafter the record shows that the same twelve jurors first empaneled were placed in the box and shows that said jurors were sworn, but it is not plain as to whether the record intends to show that such jurors were re-sworn

after the second formal arraignment and plea of the defendant, or whether it is attempted to recite the fact that such jurors
70 were sworn prior to their dismissal theretofore, as recited.

The defendant did not plead former jeopardy specially, neither did he raise it by motion or call it to the attention of the court in any manner prior to entering upon the trial of the case, but at the conclusion of the testimony on the part of the territory, he interposed a motion for an instructed verdict, and, as one of the grounds for said motion, attempted to raise the question of former jeopardy as follows:

"That the record of the court shows former jeopardy in that it shows that a jury had, prior to this trial, been called, empaneled and sworn to try this case and the charges contained in the said indictment, and that thereafter the jury was dismissed."

Former jeopardy was also relied upon in a motion filed in arrest of judgment.

In the view we take of the question, it is not necessary for us to determine the question as to whether or not the defendant was placed in jeopardy by the swearing of the first jury for the reason that the matter was not properly raised or presented to the court. Sec. 3422, R. S. 1897 is as follows:

"In criminal cases the common law, as recognized by the United States and the several states of the Union, shall be the rule of practice and decision."

Several of the states have statutes altering the common law provisions as to practice and procedure in criminal cases. Some such statutes provide that a defendant may put in issue, under a plea of not guilty, all defenses which he may have to the charge upon which he is being prosecuted, and in those states it is uniformly held that he may prove under such general issue, former jeopardy, or autrefois acquit or convict. However, according to the doctrine of the common law it is held in most of the states, that the defense of former jeopardy, or former conviction or acquittal, must be specially pleaded, and such defenses are not admissible under the general issue.

71 9 Ency. Pl. & Pr. 630.

"The defendant's plea of not guilty puts in issue all of the allegations of the indictment or information, and nothing more. In this case the defendant would not have been allowed to prove at the trial that he had been once in jeopardy, for there was no such issue in the case, and could be none unless he saw fit to make it by plea."

People vs. Bennett, 114 Cal., 56.

In that case the defendant filed no special plea, and attempted to raise the question of former jeopardy by his motion for a new trial. The court held that this could not be done, for it would be permitting the defendant to introduce evidence upon his motion for a new trial that would not have been admitted if offered at the trial. The defendant going to trial upon the general issue of not guilty, and having filed no special plea in bar, setting up former

jeopardy, could not introduce in evidence such former jeopardy, and as he could not introduce such fact in evidence, he could not rely upon it in his motion for an instructed verdict.

"The whole question of once in jeopardy was entirely foreign to the case, unless raised by a special plea, and, when so raised, an issue of fact was presented, which the jury alone possessed the power to pass upon."

People vs. Bennett, supra.

In the California case above cited, the defendant was being prosecuted upon the same information under which he claimed former jeopardy had attached.

See also Zachary vs. State, 7 Baxt. 1; State vs. Washington, 28 La. Ann., 78; State vs. Barnes, 32 Me. 534; Rickles vs. State, 68 Ala., 538.

Also De Arman vs. State, 79 Ala., 10, where the court held that a former conviction or acquittal must be specially pleaded, and when so pleaded, the issue joined on it must be tried and determined before the issue on the plea of not guilty is submitted to the
72 jury.

In the case of State v. Buzzell, 58 N. H. 257, the court, in speaking of the defense of former acquittal, or former jeopardy say;

"Former acquittal or former jeopardy, as a defense, is a plea of discharge or release that gives a reason why the defendant ought not to answer the indictment, and ought not to be put upon trial for the crime alleged. 4 Bl. Com. 335. The plea of not guilty raises the question, not whether, by former acquittal or jeopardy, he is discharged from a crime, but whether he committed it. When, as in this case, there is an opportunity to plead former judgment or jeopardy, and it is not pleaded, the case is as if there were no former judgment or jeopardy."

See also Gunter v. the People, 22 Colo., 121, where the Court held that former acquittal, or conviction, must be pleaded specially, evidence of either not being admissible under the plea of not guilty.

The Supreme Court of Massachusetts, in the case of Commonwealth v. Chesley, 107 Mass. 223, state the rule as follows:

"If the defendant relied upon former acquittal, *be* should have pleaded it specially, so that issue might have been taken upon it either to the court or the jury. It cannot be proved under the general issue."

In the case of McBean v. State, 3 Heisk., 20, the defendant had filed a formal plea in bar of former conviction, but such plea was not urged by counsel, and they proceeded with the trial without first insisting on a determination of the plea so filed. After examining one witness they attempted to rest and secure a determination upon such plea; the right to do so was denied. The court say:

"The defendant and his counsel were bound to know and to take notice of the pleadings which were on file in the case; and going to trial upon the plea of 'not guilty' alone, was a waiver of the
73 defense of former conviction."

See also in re Allison, 23 Colo, 525, where the court held

that the defense of prior jeopardy for the same crime should be presented by special plea to the trial court. See also Logan v. State (Miss.) 40 So. 323; Commonwealth v. Merrill, 8 Allen 545.

It is true cases can be found holding that it is not necessary to plead former jeopardy where such fact appears upon the record in the case upon trial, but an examination of the cases so holding will demonstrate the fact that the courts in such cases apparently entirely overlooked the common law rule, and no good reason, we believe, can be advinced in support of such doctrine. Former jeopardy is properly a plea in bar of the action, and it does not go to the merits. If such plea is well taken it disposes of the case. It has nothing to do with the question of the guilt or innocence of the defendant.

For the reason stated we are of the opinion that the court did not err in refusing to direct a verdict of not guilty upon the ground of former jeopardy.

The third proposition discussed by appellant is that there was no valid jury empaneled and sworn to try the case, and therefore defendant was not accorded due process of law, as required by the constitution of the United States and the laws of New Mexico, but the record disposes of this contention adversely to the appellant. After the second arraignment the record recites:

"And *not* the issue in the above entitled cause being joined, both parties again announce themselves ready for trial, and now comes the jury as follows, to-wit:" (setting forth the same 12 jurors theretofore shown by the record to have been empaneled), and continues: "twelve good and lawful men taken from the body of the County of Taos, and Territory of New Mexico, sworn to well and truly try the issues joined in the cause now pending, and a true verdict therein to render according to the law, the evidence and the instructions of the court."

74 Appellant relies upin the fact that the jurors so elected and empaneled were the same jurors theretofore selected and dismissed by the court, so that the defendant could be re-arraigned. There is nothing in the record to show but that such jury was selected in the manner required by law, and no objection or question appears to have been raised by appellant at the time.

The fourth ground assigned is that the court erred in refusing to grant appellant a continuance. The motion for continuance was based upon the ground that appellant's counsel could not be present at the trial, and was supported by the affidavit of the attorney. It does not appear, however, that appellant could not procure other counsel fully capable of representing him, and in fact the record in this case shows that the defendant was ably defended, and it does not appear that he suffered in any manner by reason of the denial of such motion. The granting or denying of a motion for continuance is within the discretion of the trial court and unless such discretion has been abused, to the injury of the defendant, the denial of such motion will not constitute error. A number of cases have been cited by counsel for appellant in his brief, to sustain his position that it was error to overrule the motion for a continuance, but there are innumerable cases whch show that a request for a continu-

ance on the ground of the absence of certain counsel is not looked upon by the courts with favor.

"Since the court trying the cause is from personal observation familiar with all the attendant circumstances, and has the best opportunity for forming a correct opinion upon the case presented, the pre-umption will be in favor of its action; and in no case will the exercise of this discretion be reviewed where it manifestly appears that justice has been done without sacrificing the rights of the defendant." 9 Cyc. 168.

The absence of counsel due to the fact that he was attending a court held in another county in a civil case there pending. The following quotations will show that there was no abuse of discre-
75 tion upon the part of the district court in overruling the motion for a continuance upon such grounds.

In the case of Roberts v. People, 9 Colo. 465, 13 Pac. 634, the court said, in passing upon the denial of a motion for continuance on account of the absence of attorney for the defendant;

"The judge of the criminal court cannot reasonably be required to postpone the business of his court in order to suit the convenience of lawyers who may desire to attend the sessions of other courts. Such a ruling could not be sustained on either principle or authority, and, if it could, the results would be detrimental to the public interests, and in many cases to the interests of suitors as well, it would in many instances interfere with the prompt dispatch of business in the various courts, and tend to prolong their sessions, thus aiding materially to the expenses thereof."

In People v. Goldenson, 19 Pac. 167, the court said:

"To hold that a defendant charged with crime has an absolute right to counsel of his own selection, with unlimited right to insist upon continuances of his trial, and that the court, jury, and witnesses must await the convenience of his counsel in fulfilling other engagements, would be sub-ersive of the prompt administration and execution of the laws,—upon which depends largely their effectiveness,—and subject the time and service of citizens serving the state gratuitously, as jurors and witnesses, to the wishes of the attorney engaged in the defense. It is too apparent for argument that the court below must, in the nature of things, have some control over such matters; and, if it has any discretion, it is equally apparent that it was not abused in this particular instance."

The case last cited would seem to be particularly applicable to the case at bar, in that, as held in other cases which will be cited, it was the business of counsel to know when there would be a term of the court held in the county of Taos or when an adjourned term thereof would be held.

76 "The absence of counsel for the defendant in an adjoining county, attending court, is no ground for continuance. If it were terms of court — conflict, continuances would be of frequent occurrence." Van Horn v. State, 5 Wyoming 501-10, 40 Pac. 864-6.

"In regard to the other cause for continuance, the absence of his leading counsel, such cause might under some circumstances be sufficient to demand the continuance of a case. But this case does

not present such facts as would, we think, entitle defendant to a continuance for this reason, nor is it shown that he suffered any injury on account of the absence of his leading counsel. He was ably and faithfuly represented on the trial of the cause by other counsel, as the record abundantly attests." Walker v. State, 13 Texas Court App., 645.

Appellant also assigns as error the giving by the court of certain instructions, and its refusal to give other instructions requested by the defendant. A reference to the record, however, shows that the instructions in the case were filed in the Clerk's office on the 25th day of May, 1911, which is the date when the instructions were given. There is nothing to indicate any objection or exception to the instructions so given, until two days thereafter when a paper was filed in the clerk's office. Purporting to be exceptions to the instructions. This court has held that where instructions given by the court are objectionable to the defendant, the court's attention must be called to such objectionable instructions at the time they are given, so that the court can, in a proper case, correct the same. See State v. Baker, decided at the present term of this court. The same doctrine was announced by the Territorial Supreme Court. Territory v. Caldwell, 14 N. M. 535. Territory v. Gonzales, 14 N. M. 31, Territory v. Watson, 12 N. M. 419. Territory v. O'Donnell, 4 N. M. 196.

77 The same rule applies to requested instructions which the court refuses to give. It is the duty of the defendant, if he intends to predicate error upon such refusing to give such instructions. The theory upon which the doctrine announced by the court is based, is that the attention of the court should be specifically called, by objection, to the error of its proposed action in giving or refusing to give instructions at the time of such giving or refusal, and the reason for such objection stated, so that the court may have the benefit of having pointed out to it, the alleged errors, and the ground upon which the party predicates his claim, so the court may have an opportunity at the time, to correct and rectify the mistake. The filing of specific objections and exceptions two days, or at any time after the jury has retired, is of no assistance to the court, and does not comply with the rule. For the reason stated, the court will not consider the claimed error as to such instructions.

It is next claimed that the court erred in its refusal to permit evidence of specific acts showing lawless and violent conduct on the part of the deceased. The well established rule in this state is that in cases of homicide it is permissible to allow the defendant to show the general reputation of the deceased as to being a lawless and violent character, but not to permit evidence to specific acts on the part of the deceased. U. S. v. Densmore, 12 N. M. 99.

It is also made a matter of complaint that the court erred in admitting in evidence a portion of the skull of the deceased. The evidence discloses that there was another mortal wound upon the head of the deceased, while the portion of the skull produced showed only one of these mortal wounds, but there was no error on

the part of the court in this regard, and the defendant has failed to show how he was prejudiced in any manner by such action of the court.

78 It is lastly urged that the court erred in admitting the evidence of the sheriff of Taos County as to a conversation with the defendant while defendant was in jail, the claim being made that the conversation was something in the nature of a confession, and that it was not shown to be voluntary. An examination of the record, however, discloses that the conversation testified to by the sheriff was practically the same as the evidence given in the case by the defendant himself. Such statement, so made by the defendant, did not tend to incriminate him in any manner, but was self explanatory, and defendant cannot predicate error thereon. Again, no evidence was presented, either upon cross examination of this witness, or by any other witness, that anything which the prisoner said was in consequence of durress or threats or promises, or otherwise than entirely voluntary.

Finding no error in the record, the judgment of the lower court is affirmed, and, it is so ordered.

CLARENCE J. ROBERTS,
Chief Justice.

We Concur:
RICHARD H. HANNA, *J.*
FRANK W. PARKER, *J.*

And afterwards on towit on the 21st day of July A. D., 1913, there was filed in the office of the clerk of the Supreme Court of the State of New Mexico, an opinion by the Court, denying the motion for rehearing, which opinion denying the motion for rehearing was and is in the following words and figures to-wit.

In the Supreme Court of the State of New Mexico,

January Term, A. D. 1913.

No. 1452.

TERRITORY OF NEW MEXICO, Appellee,
vs.
BENITO LOVATO, Appellant.

Appeal from District Court, Taos County.

79 On Motion for Rehearing.

ROBERTS, *C. J.*:

In the former opinion we say "The defendant did not plead former jeopardy specially, neither did he raise it by motion or call it to the attention of the court in any manner prior to entering upon the trial of the case." This statement would seemingly indicate that the question woulc have been raised either by plea in bar, or

by motion, before entering upon the trial of the case, but the authorities cited imply that such question could only be raised by plea in bar. It is true some courts hold that such question can only be raised by a plea in bar, even where the defendant is being prosecuted under the same indictment, upon which he contends he has already been placed in jeopardy, still, as contended by appellant here, we believe the question can be raised by motion, or in any other appropriate manner, where the defendant is being prosecuted upon the same indictment, and the record in the case contains a recital of all the facts upon which defendant relies. While this is true, the question must be raised at the earliest opportunity. If the defendant has not been arraigned it must be interposed upon arraignment; if he has already been arraigned, and no second arraignment is necessary it must be raised before entering upon the trial of the case.

In this case the question appears of record in the same case and no good reason exists for the interposition of a special plea. The record in this case discloses that the defendant did not raise the question of former jeopardy in any manner, prior to entering upon the trial of the case, and only did so at the conclusion of the state's case, by motion for an instructed verdict. A very interesting discussion of the question will be found in a case note to the case of, State vs. White (71 Kan., 356) reported in 6 A. & E. Ann. Cas. 132. The annotator says:

80 "It has been held in a number of cases that a person accused *by* crime waives his privilege of immunity from second jeopardy by failing to plead or otherwise set up the former jeopardy when he is arraigned in the second prosecution."

The text is supported by numerous adjudicated cases. In the Kansas case the court says:

"When about to be placed in jeopardy before a second jury the accused may, if he so desire, take the chances of a favorable verdict. Should he choose so to do, no one can gainsay him; but it is his duty to make his election then. If it be his purpose to rely upon his right to bar further proceedings he should then so declare. He can not hazard a trial and when defeated revert to a matter which would have prevented a trial. Failing to interpose an objection to entering upon a second trial, he must be held to have waived the right to do so, and must abide the result he invited."

To permit a defendant to sit idly by until he ascertains the strength of the state's case against him, and then permit him, should the state make out a strong case, which he felt he could not overcome, to raise the question of former jeopardy, would be, as remarked by the Kansas court, in the case cited supra, to "sanction a practice which might be termed trifling with the court."

Therefore, after a careful review of the authorities we are of the opinion that the question of former jeopardy may be raised, where the facts upon which such plea are based appear of record in the same case, by a plea in bar, or by motion for discharge of the defendant, or by objecting to entering upon the second trial, upon such ground, or in any other appropriate manner by which the

matter is called to the attention of the trial court, but that such question must be raised at the *at the* first opportunity. In this case, the question not having been raised until the state had concluded its case, it came too late, and the court properly over-
81 ruled the motion for an instructed verdict.

For the reasons stated the motion for rehearing is denied.

CLARENCE J. ROBERTS,
Chief Justice.

We Concur:
RICHARD H. HANNA, *J.*
FRANK W. PARKER, *J.*

And afterwards, on towit *on* the 22nd day of January, A. D. 1915, a mandate from the United States Circuit Court of Appeals, which said mandate from the United States Circuit Court of Appeals was and is in words and figures following towit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of New Mexico, Greeting:

Whereas, lately in the Supreme Court of the State of New Mexico, as the successor of the Supreme Court of the Territory of New Mexico, in a cause between Benito Lovato, Appellant, and the Territory of New Mexico, Appellee, wherein the judgment of the said Supreme Court in said cause, entered on the 9th day of May, A. D. 1913, was in favor of the said appellee and against the said appellant, Benito Lovato, as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the United States Circuit Court of Appeals for the Eighth Circuit, by virtue of a writ of error agreeably to the act of Congress, as is claimed, in such case made and provided, fully and at large appears.

And whereas, at the December term, in the year of our Lord, one thousand nine hundred and fourteen, the said cause came on
82 to be heard before the said United States Circuit Court of Appeals, on the motion to quash the writ of error to the Supreme Court of the State of New Mexico, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the said motion to quash the writ of error herein, be, and the same is hereby, sustained; and that the writ of error in this cause to the Supreme Court of the State of New Mexico, be, and the same is hereby, quashed and held for naught.

It is further ordered that this cause be, and the same is hereby, remanded to the Supreme Court of the State of New Mexico, for proceedings therein according to law and justice.

January 4th, 1914.

You, therefore, are hereby commanded that such proceedings be had in said cause, as according to right and justice, and the laws of

the United States, ought to be had, the said writ of error notwithstanding.

Witness, The Honorable Edward D. White, Chief Justice of the United States, the Twentieth day of January, in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.] JOHN D. JORDAN,
Clerk United States Circuit Court of Appeals, Eighth Circuit.

83 SUPREME COURT,
State of New Mexico, ss:

I, José D. Sena, Clerk of said court, do hereby certify that the foregoing pages, numbered 1 to 82, inclusive, are a true, full and complete transcript of the record and proceedings in the case of Territory of New Mexico, appellee, vs. Benito Lovato, appellant, and also of the opinions of the court rendered therein as the same now appear on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in Santa Fé, New Mexico, this the 5th day of March, A. D., 1915.

[Seal Supreme Court, State of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

84 Filed in My Office This Feb. 8, 1915. José D. Sena.

Supreme Court of New Mexico.

TERRITORY OF NEW MEXICO, Appellee,
v.
BENITO LOVATO, Appellant.

Petition for Writ of Error.

Considering himself aggrieved by the final decision of the Supreme Court of New Mexico in rendering judgment against him in the above entitled cause, the appellant, Benito Lobato, hereby prays a writ of error from the said decision and judgment, to the United States Supreme Court and an order fixing the amount of a supersedeas bond.

T. B. CATRON,
Attorney for Appellant.

Assignments of Error Herewith.

STATE OF NEW MEXICO,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by the appellant, Benito Lobato, to the State of New Mexico in the sum

of five thousand ($5,000) dollars; such bond when approved to act as a supersedeas.

Dated February 6th, 1915.

CLARENCE J. ROBERTS,
Chief Justice of the Supreme Court of New Mexico.

85 Supreme Court of New Mexico.

TERRITORY OF NEW MEXICO, Appellee,
v.
BENITO LOVATO, Appellant.

Assignment of Errors and Prayer for Reversal.

Now comes the above appellant, Benito Lobato, by his attorney T. B. Catron, and files herewith his petition for a writ of error, and says: that there are errors in the record and proceedings of the above entitled cause, and for the purpose of having the same reviewed in the United States Supreme Court makes the following assignments:

I.

The Supreme Court of New Mexico erred in holding and deciding against the right, privilege and immunity, from twice being put in jeopardy of life and limb for the same offense, secured to a resident of the Territory of New Mexico by the Fifth Amendment of the Constitution of the United States of America, such right, privilege and immunity having been specifically set up and claimed by appellant, the defendant, in the above entitled cause. And the said errors are more particularly set forth as follows:

The Supreme Court of New Mexico erred in holding and deciding:

(*a*) That the trial court (the District Court of the County of Taos, Territory of New Mexico) did not err in refusing to direct a verdict of not guilty made by motion at the close of the
86 case in chief of the prosecution, upon the ground of former jeopardy appearing upon the face of the record of the above entitled cause. The right, privilege and immunity from second jeopardy being specially set up and claimed by defendant in his said motion for a directed verdict of not guilty, under the Fifth Amendment of the Constitution of the United States of America, which provides:

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

which said decision is against said right, privilege and immunity so claimed.

(*b*) That

"In the view we take of the question it is not necessary for us to determine the question as to whether or not the defendant was

placed in jeopardy by the swearing of the first jury for the reason that the matter was not properly raised or presented to the Court."

Said decision being against the right, privilege and immunity, secured to a resident of the Territory of New Mexico by the Fifth Amendment of the Constitution of the United States of America; which said right, privilege and immunity, the defendant and appellant specifically set up and claimed at the close of the case in chief of the prosecution by a motion for an instructed verdict based upon former jeopardy being apparent upon the face of the record of the identical cause on trial and being a question of law for the court to pass upon.

(*c*) That

"Therefore, after a careful review of the authorities we are of the opinion that the question of former jeopardy may be raised, where the facts upon which such plea are based appear of record in the same case, by a plea in bar or by a motion for discharge of the defendant, or by objecting to enter upon the second trial upon such ground, or in any other appropriate manner by which the matter is called to the attention of the trial court, but that such question must be raised at the first opportunity. In this case the question not having been raised until the State had closed its case, it
87 came too late and the court properly overruled the motion for an instructed verdict."

Said decision being against the right, privilege and immunity, secured to a resident of the Territory of New Mexico by the Fifth Amendment of the Constitution of the United States of America, which provides:

"Nor shall any person be subject for the same offense to be twice placed in jeopardy of life or limb."

which said right, privilege and immunity appellant, the defendant, specifically set up and claimed at the close of the case in chief of the prosecution, by a motion for an instructed verdict, which was based upon former jeopardy being apparent on the face of the record of the identical case on trial and being a question of law for the court to pass upon which became decisive of said cause.

(*d*) As hereinabove indicated, and in failing, neglecting and refusing to pass upon and in dodging the specific claim of former jeopardy, specially set up and claimed by defendant, upon the trial and urged before the Supreme Court of New Mexico, as a right, privilege and immunity secured unto defendant by the Fifth Amendment of the Constitution of the United States of America, and which said holding and decision, or failure, neglect and refusal to pass upon and dodging the constitutional question presented and raised, is a decision against the right, privilege and immunity so set up and claimed and guaranteed.

(*e*) As hereinabove indicated, and in failing, neglecting and refusing to pass upon and in dodging the claim of right, privilege and immunity, specifically set up and claimed by defendant under the

Constitution of the United States of America; which said holding and decision, or failure, neglect and refusal to pass upon and dodging the constitutional, question presented and raised is a decision in violation of the constitutional guarantee that no person
88 be deprived of life, liberty or property without due process of law, and is a decision against the right, privilege and immunity so set up, claimed and guaranteed, which said question is decisive of said cause.

II.

The Supreme Court of New Mexico erred in holding and deciding against the right of trial by jury, secured to a resident of the Territory of New Mexico by the Constitution of the United States of America and by the laws of New Mexico, thereby violating the constitutional guaranty, that no person should be deprived of life, liberty or property, without due process of law, such right having been set up and claimed by appellant, the defendant, in the Supreme Court of New Mexico, which said errors are more particularly set forth as follows:

The Supreme Court of New Mexico erred in holding and deciding:

(*a*) That

"The third proposition discussed by appellant is that there was no valid jury empanelled and sworn to try the case, and therefore defendant was not accorded due process of law as required by the constitution of the United States and the laws of New Mexico, but the record disposes of this contention adverse to appellant. * * * There is nothing in the record to show but that such jury was selected in the manner required by law. * * * "

The right to a trial by a valid common law jury having been specifically set up and claimed by defendant in the Supreme Court of New Mexico, under the constitutional guaranty to a resident of the Territory of New Mexico, that all crimes shall be tried by a jury; which said decision is against said right so claimed, and is a violation of and in contravention of the constitutional provision that no person shall be deprived of life, liberty or property without due process of law and which said decision is against such right so guaran-
89 teed, set up and claimed by appellant.

For which errors appellant Benito Lobato, prays that the said judgment of the Supreme Court of the State of New Mexico dated May 9th, 1913, and July 21st, 1913, be reversed and the cause be remanded with directions to discharge the defendant and appellant.

T. B. CATRON,
Attorney for Appellant, Benito Lobato.

90 Know all men by these presents, That We, Benito Lovato, as Principal, and Malaquias Martinez, Antonio B. Trujillo, Enrique Jaquez, Silviano Roybal, Antonio M. Casados and ——— ——, as sureties, are held and firmly bound, and acknowledged ourselves

indebted to, the State of New Mexico in the sum of Five Thousand ($5,000.00) Dollars, Lawful money of the United States of America, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators firmly and severally by these presents.

Sealed with our seals and dated this 3rd day of February, 1915.

The condition of the above obligation is such, that whereas the said Benito Lovato has sued out a writ of error from the judgment of the Supreme Court of the State of New Mexico, affirming the judgment of the District Court of the County of Taos, New Mexico, to the Supreme Court of the United States in the case in said court wherein the said Benito Lovato is the appellant and the State of New Mexico is appellee, for a review of said judgment in the Supreme Court of the United States;

Now, if the said Benito Lovato shall appear and surrender himself in the Supreme Court of the State of New Mexico on and after the filing in the said Supreme Court of the State of New Mexico of the mandate of the said Supreme Court of the United States, and from time to time thereafter as he may be required to answer any further proceedings, and abide and perform any judgment or order which may be had or rendered therein in this case, and shall abide by and perform any judgment or order which may be rendered in said Supreme Court of the United States, and not depart from the said Supreme Court of New Mexico without leave thereof, and answer for all costs which may be adjudged against him in said cause, then this obligation shall be void; otherwise to remain in full force and virtue.

Witness our hands and seals this 3rd day of February,
91 A. D., 1915.

(Signed) BENITO LOVATO.
(Signed) MALAQUIAS MARTINEZ.
(Signed) ANTONIO B. TRUJILLO.
(Signed) ENRIQUE JAQUEZ.
(Signed) SILVIANO ROYBAL.
(Signed) ANTONIO M. CASADOS.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

Malaquias Martinez, Antonio B. Trujillo, Enrique Jaquez, Silviano Roybal, Antonio M. Casados being each duly sworn, each upon his oath says that he is the owner and in possession of property in the State of New Mexico to the value of $1000.00 over and above his just debts and liabilities and property exempt by law from execution or attachment.

(Signed) MALAQUIAS MARTINEZ.
(Signed) ANTONIO B. TRUJILLO.
(Signed) ENRIQUE JAQUEZ.
(Signed) SILVIANO ROYBAL.
(Signed) ANTONIO M. CASADOS.

Subscribed and sworn before me this 3rd day of February, 1915.

[NOTARIAL SEAL.] ALBERT CLANCY,
Notary Public in and for the County of Santa Fé, State of New Mexico.

My Commission expires August 20, 1916.

STATE OF NEW MEXICO,
County of Santa Fé, ss:

On this Feb. 3rd, 1915, before me, the undersigned authority, personally appeared, Benito Lovato, Malaquias Martinez, Antonio B. Trujillo, Silviano Roybal, Enrique Jaquez, and Antonio M. Casados to me well known to be the persons who executed the foregoing instrument and each acknowledged to me that he executed the
92 same as his free act and deed.

In witness whereof I have hereunto set my hand and affixed my official seal, this the day and year first above written.

(Signed) ALBERT CLANCY,
[NOTARIAL SEAL.] *Notary Public.*

My Commission expires August 20, 1916.

The foregoing bond is hereby approved by me as to form and sufficiency thereof, this 3rd day of February, 1915.

CLARENCE J. ROBERTS,
Chief Justice of the Supreme Court of the State of New Mexico.

93 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New Mexico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Territory of New Mexico and Benito Lovato, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute or, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission: a manifest error hath happened, to the great damage of the said Benito Lovato, as by his complaint appears.

We being willing that error, if any hath been, should be duly

corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to
94 the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 5th day of March, in the year of our Lord one thousand nine hundred and fifteen.

[Seal United States District Court, District of New Mexico, 1912.]

HARRY F. LEE,
Clerk United States District Court,
District of New Mexico.

Allowed March 5th, 1915.
CLARENCE J. ROBERTS,
Chief Justice, Supreme Court of New Mexico.

Filed in my office this Mar. 5, 1915. Jose D. Sena, Clerk.

95 *Certificate of Lodgment.*

SUPREME COURT,
State of New Mexico, ss:

I, José D. Sena, Clerk of said court, do hereby certify that there was lodged with me as such Clerk on March 5th, 1915, in the matter of the Territory of New Mexico, versus Benito Lovato.

1. The original bond of which a copy is herein set forth.
2. Two Copies of the writ of error, as herein set forth, one for defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affix- the seal of said court at my office, in Santa Fé, this 6th day of May, 1915.

[Seal Supreme Court, State of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

96 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of New Mexico, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C.,

within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of New Mexico, wherein Benito Lovato is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of New Mexico, this the 6th day of March, 1915.

CLARENCE J. ROBERTS,
Chief Justice Supreme Court of New Mexico.

[Seal Supreme Court, State of New Mexico.]

Attest:
JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

SANTA FÉ, NEW MEXICO, March 6th, 1915.

I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

FRANK W. CLANCY,
Attorney General for the State of New Mexico.

97 In the Supreme Court of the United States.

No. —.

BENITO LOVATO, Plaintiff in Error,
vs.
TERRITORY OF NEW MEXICO, Defendant in Error.

Error to Supreme Court, State of New Mexico.

Præcipe for Record to be Returned with Writ of Error in the Above-entitled Cause to the Supreme Court of the United States.

To the Clerk of the Supreme Court of the State of New Mexico:

You will please prepare and transmit under your hand and the seal of the supreme court of the State of New Mexico, together with the writ of error issued by Honorable Edward D. White, Chief Justice of the Supreme Court of the United States on March 5th, 1915, returnable to the Supreme Court of the United States, so that you have the same at Washington City on the 4th day of May, 1915, as your return to the said writ of error, a true copy of the assignment of errors, filed with the petition of the above named plaintiff in error for a writ of error, and a true copy of so much of the record in said cause in the supreme court of the state of *Washington* and of all the proceedings in said cause, as is designated below, to-wit:

All of that portion of the Transcript of the record on appeal from

the District Court of the County of Taos, contained in pages 2 to 66, inclusive.

That portion of the said Transcript of record on appeal from the said District Court of the County of Taos, as indicated from page 162 to page 163 and on page 212 of the said Transcript of record.

Journal entries in cause No. 1452 in the Supreme Court.

Motion for rehearing in the Supreme Court of New Mexico.

Opinion of the Supreme Court of New Mexico, in this case
98 filed May 9th, 1913.

Opinion of the Supreme Court of New Mexico, in this case filed July 21st, 1913.

Mandate from United States Circuit Court of Appeals in this case.

Petition for writ of errors and assignment of errors filed with his petition for writ of error by Benito Lovato.

Order of Honorable Clarence J. Roberts, Chief Justice of the Supreme Court of New Mexico, allowing writ of error and fixing amount of bond to act as supercedeas.

Copy of this præcipe.

T. B. CATRON,
Attorney for Benito Lovato.

99 UNITED STATES OF AMERICA,
Supreme Court of New Mexico, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of New Mexico, in the City of Santa Fé, this 6th day of March, 1915.

[Seal Supreme Court, State of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

Endorsed on cover: File No. 24,709. New Mexico Supreme Court. Term No. 123. Benito Lovato, plaintiff in error, vs. The State of New Mexico. Filed May 7th, 1915. File No. 24,709.

NOV 27
JAMES D.

BRIEF OF PLAINTIFF IN ERROR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 122.

BENITO LOBATO, PLAINTIFF IN ERROR,

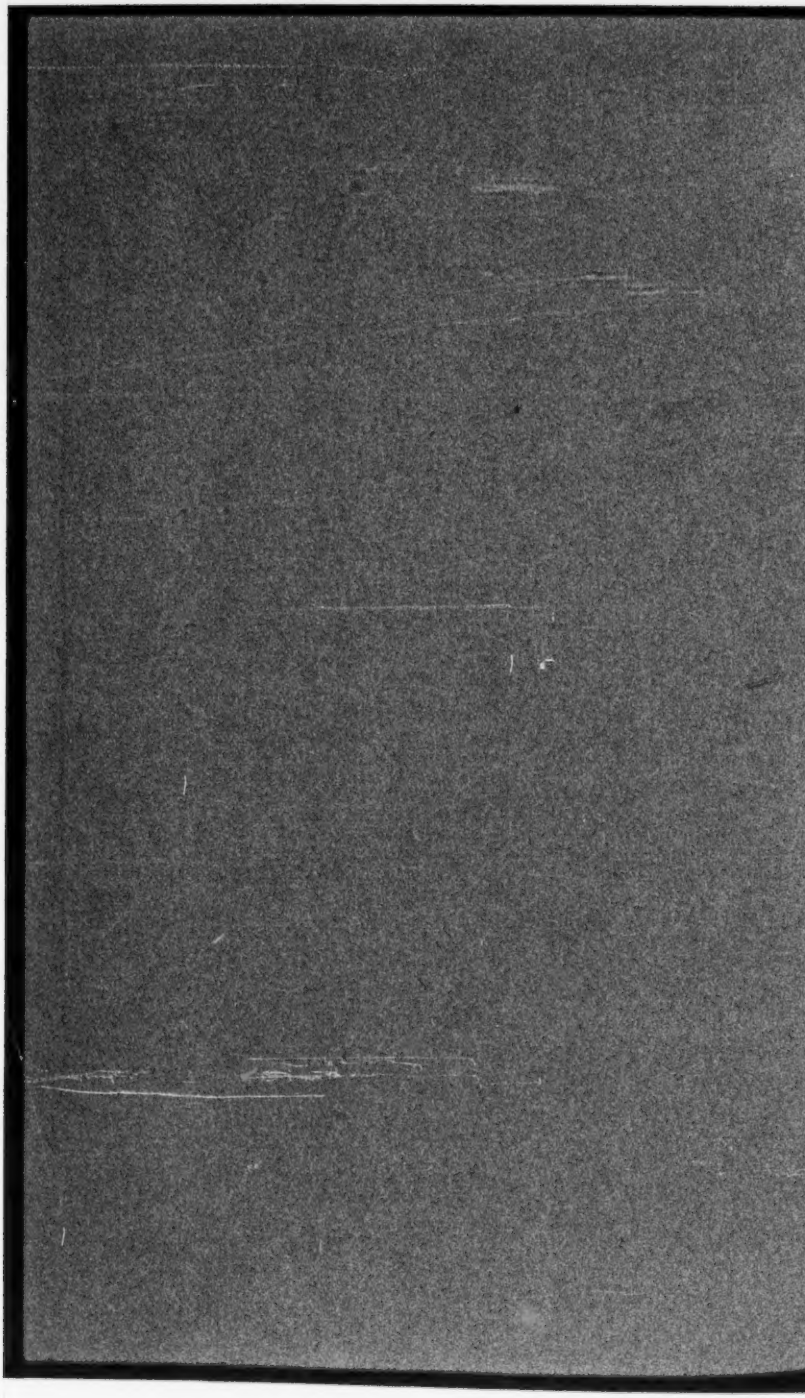
vs.

STATE OF NEW MEXICO, DEFENDANT IN ERROR.

T. B. CATRON,
Santa Fe, N. M.,
Attorney for Plaintiff in Error.

CATRON & CATRON,
Santa Fe, N. M.,
of Counsel.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF NEW MEXICO.



SUBJECT INDEX.

STATEMENT OF THE CASE.....Pps. 1-2-3

Specifications of Error.....Pps. 3-4

Argument.....P. 4

Twice in Jeopardy.....P. 5

Principles of law contended for by Plaintiff in Error.....P. 7

(A) That the moment the jury was duly empanelled, selected, accepted, sworn and charged, defendant was placed in jeopardy.....P. 8

(B) That the moment such jury was dismissed by the court, without the consent of defendant, and without imperious necessity, such dismissal is in law an acquittal.....P. 12

(C) That when such jeopardy or constructive acquittal appears upon the face of the record proper the court must take judicial notice thereof without plea.....P. 15

(D) That when such former jeopardy or constructive acquittal appears upon the face of the record proper it may be called to the court's attention at any time before final judgment or sentence, and in any convenient manner, such as by motion before verdict, arrest of judgment after verdict or by objection to the court pronouncing sentence, etc.....P. 19

(E) That when such jeopardy, appearing upon the face of the record proper, has been called to the court's attention in some appropriate manner, and a privilege or immunity is claimed under the Constitution of the United States, it is the court's duty to give effect to such constitutional immunity and put an end to the second trial.....P. 22

(F) Application of foregoing doctrines to case at bar.....P. 22

No valid jury.....P. 33

INDEX TO AUTHORITIES CITED, REFERRED TO, OR DISCUSSED.

	Page
Allen v. Kansas, 59 Kan. 758-760	12
Anderson v. Territory, 4 N. M. 213-228	21
Armstrong v. Hall, 65 Vt. 421	37
Aurandt v. U. S., 15 N. M. 292-297	30-31
Bank of Montreal v. Taylor, 86 Ill. App. 388	18
Barrett v. People, 2 Am. Dec. 239-240	13
Bates v. People, 61 Pac. 905	18
Bennett v. People, 114 Cal. 56	22
Bennett, In Re, 84 Fed. 324-326	17-20-22-24
Biglow, Ex Parte, 113 U. S. 328	9
Bishop's New Criminal Law, Vol. 1, S. 1015	8
Bishop's New Criminal Procedure, Vol. 2, S. 821, (2nd Ed.)	12-19
Bowen v. State, 16 Kan. 475-477	18
Bowman v. State, 78 Iowa, 520	14
Bradner v. People, 107 N. Y. 1-10	14
Brucker v. State, 19 Wis. 566-577	18
Bryant v. National Bank, etc., 13 Ky. 419	18
Buchanan, Matter of, 146 N. Y. 271	37
Calendine v. State, 8 Iowa, 288-290	13
Cassidy v. State, 12 Kans. 423	15
Clue v. Comm., 3 Rawles R. 501	13
Coleman v. Tenn., 97 U. S. 509	9
Commonwealth v. Clue, 3 Rawles R. 501	13
Commonwealth v. Cooke, 6 S. & R. 577	13
Commonwealth v. Fitzpatrick, 1 L. R. A. 451-452	10
Commonwealth v. Hilands, 111 Penn. St. 1	11
Commonwealth v. O'Brien, 9 Bush (Ky.) 333	13
Commonwealth v. Filliams, 44 Am. Dec. 403-404	13
Cooke v. Commonwealth, 6 S. & R. 577	13
Cooley's Const. Lim., P. 467 (7th Ed.)	9
Crain v. U. S., 162 U. S. 625	14-27-32-36-38
Cross v. State, 29 S. E. 527-528	16-20
Daugherty v. State, 106 Mo. 182-187	18
Dawson v. Dawson, 29 Mo. App. 521	18
Deering's Cal. Pen. Code, Secs. 1016-17-20	22
Dobbins v. State, 14 Ohio State, 493-499	13
Elliott v. Mo., Kas., etc., Ry. Co., 184 U. S. 530-533	29
Ency. Plead. & Pract., P. 565, S. 9	15
Erie Ry. Co. v. Purdy, 185 U. S. 148-152	29
Ex Parte Biglow, 113 U. S. 328	9
Ex Parte Ulrich, 42 Fed. 587-594	13
Fitzpatrick v. Commonwealth, 1 L. R. A. 451-452	10
Foster v. State, 29 Tex. App. 543-544	16
Ganigues v. State, 1 Hayw. (N. C.) 241	13
Gamelly v. State, 37 Ohio, 120	14
Garland v. Washington, 232 U. S. 642-645	14-27
George v. State, 80 N. W. 486-487	17
Gildersleeve v. Water & Imp. Co., 4 N. M. 318-322	21
Goodwin v. People, 18 Johns. 187-204	13

	Page
Gonzales v. Territory, 13 N. M. 94-97	30-31
Hagan v. Reclamation Dist. 111 U. S. 708	37
Hall v. Armstrong, 65 Vt. 421	37
Harding v. People, 19 N. W. 155	16
Henscher v. People, 16 Mich. 46	14
Hilands v. Comm., 111 Penn. St. 1	11-13
Hines v. State, 24 Ohio St. 134-138	13
Hoboken Land Co. v. Murray's Lessees, 8 How. 280	37
Hopt v. Utah, 110 U. S. 574	24
Horn v. People, 70 Cal. 17-18	11
Hollenback v. Schnabel, 101 Cal. 312-315	18
Humes v. Ry., 115 U. S. 520	18
In Re Bennett, 84 Fed. 324-326	17-20-22-24
In Re Spier, 1 Dever, 491	13
Jackson v. State, 106 Mo. 174-177	18
Jarvis v. Tweedy, 27 Comm. 42-47	18
Kansas v. Allen, 59 Kans. 758-760	12
Kansas v. Stevens, 56 Kans. 720	18
Kepner v. U. S., 195 U. S. 100	9
Kinghorn v. State, 56 Wash. 131-132	11-12
Klasner v. State, 145 Pac. (N. M.) 679-682	14-30
Lampshire v. State, 114 Wis. 193	14
Lehigh v. World's Col. Exp. Co., 94 Ill. App. 433	18
McCauley v. State, 26 Ala. 135-138	13
McCorkle v. State, 14 Ind. 39-40	12
McKee v. State, 21 Am. Dec. 499-501	13
Mahala v. State, 10 Yerger's, 535	13
Martin v. People, 44 Ill. 476	14
Matter of Buchanan, 146 N. Y. 271	37
Miller v. State, 8 Ind. 325	13
Missouri, Kas., etc., Ry. Co. v. Elliott, 184 U. S. 530	29
Mitchell v. State, 42 Ohio State, 383-393	11-13
Morgan v. State, 13 Fed. 215-216	11
Murray's Lessees, etc., v. Hoboken Land Co., 8 How. 280	37
National Bank of Montreal v. Bryant, 13 Ky. 419	18
Ned v. State, 7 Porter's R. 187	13
New Mexico Codification, 1915, Secs. 1355, 1407	21
New Mexico Compiled Laws, 1897, Secs. 995-7-8-9, 1049	27-34
Nielson, Hans, Petitioner, 131 U. S. 176	24
Nolan v. State, 55 Ga. 521	13
O'Brien v. Comm., 9 Bush (Ky.) 333	13
People v. Barrett, 2 Am. Dec. 239-240	13
People v. Bennett, 114 Cal. 56	22
People v. Bradner, 107 N. Y. 1-10	14
People v. Goodwin, 18 Johns. 187-204	13
People v. Harding, 19 N. W. 155	16
People v. Henscher, 16 Mich. 46	14
People v. Horn, 70 Cal. 17-18	11-13
People v. Martin, 44 Ill. 476	14
People v. Taylor, 76 N. W. 158	18
People v. Webb, 38 Cal. 467-477	10-13
Perez v. U. S., 9 Wheat. 579	13
Pettine v. Territory, 201 Fed. 497	33-36-38
Poage v. State, 3 Ohio St. 229-238	13
Poole, Gilliam & Co. v. Seney, 70 Ia. 275	18

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 123.

BENITO LOBATO, PLAINTIFF IN ERROR,

vs.

STATE OF NEW MEXICO, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case is here on a writ of error directed to the Supreme Court of the State of New Mexico. The Plaintiff in Error, Benito Lobato, was indicted for murder May 9, 1910, at the regular May term of court of the County of Taos, Territory of New Mexico. (R. P. 1) That thereafter on the ninth day of May, 1910, Plaintiff in Error was duly arraigned and pleaded "Not guilty" to the charges contained in the indictment. (R. P. 3) That thereafter on the 24th day of May, 1911, Plaintiff in Error filed a demurrer to the indictment, (R. P. 13-14) which said demurrer was on the same day duly argued by both counsel for plaintiff and defendant, and at the conclusion of said arguments the same was overruled by the court. (R. P. 14). That thereupon both parties announced themselves ready for trial, and a jury of twelve men taken from the County of Taos, was duly empanelled, selected, accepted, charged and sworn to try the issues in said cause, and the witnesses for both sides were called, sworn and placed under the rule. (R. P. 14-15) That thereupon it appearing to the District Attorney that defendant had not been arraigned and had not plead since the overruling of the demurrer, said District Attorney moved that the jury, which had been empanelled, selected, accepted, charged and sworn as aforesaid, be dismissed and that the defendant be arraigned and plead; which said motion the court sustained and forthwith dismissed the jury and directed that the defendant be forthwith arraigned and plead. (R. P. 15) That thereupon the indictment was read to the defendant Benito Lobato in open court, and the defendant pleaded "Not guilty." (R. P. 15) That thereupon both parties again announced themselves ready for trial, and the identical jury that had theretofore been dismissed was again charged and sworn, said jury, however, not having been duly empanelled, selected and accepted at any time subsequent to its dismissal as aforesaid. (R. P. 15) That thereafter and upon the same day the jury last above referred to hear a portion of the evidence and retire in care and custody of the bailiffs for the night. (R. P. 15) That thereafter, upon the conclusion of the testimony by the prosecution and before the defendant introduced any testimony in his defense, defendant moved the court to instruct the jury to return a verdict of "not guilty," assigning as one of the grounds of said mo-

tion, that the record in this case showed upon its face that the defendant had theretofore been placed in jeopardy in this identical case. Which said motion was by the court overruled and exception duly taken by said defendant to the ruling of the court. (R. P. 36-37) That thereafter on May 25th, 1911, the taking of testimony was concluded by both plaintiff and defendant and the court instructed the jury and the jury retired and subsequently upon the same day returned a verdict of "Guilty of Voluntary Manslaughter," whereupon defendant gave notice that he would file a motion for a new trial, and the jury is excused by the court. (R. P. 15-16) That thereafter, on the 27th day of May, 1911, defendant Lobato filed a motion for a new trial and in arrest of judgment, wherein defendant assigns as the first error the overruling of the motion to instruct on account of the record showing former jeopardy, (R. P. 25), which said motion for a new trial and in arrest of judgment was by the court overruled, and exception taken. (R. P. 30) That thereupon the court pronounced sentence upon the defendant. (R. P. 31) That thereupon the defendant appealed from the judgment, verdict and sentence of the District Court of Taos County, to the Supreme Court of the Territory of New Mexico. (R. P. 31) That thereupon the aforesaid appeal was perfected, a transcript of the record filed, and the case submitted on briefs (R. P. 37), and thereafter on May 9th, 1913, the Supreme Court of the State of New Mexico, the successor to the Supreme Court of the Territory of New Mexico, affirmed the judgment of the lower court for the reasons set forth in the opinion of the court filed with the clerk. (R. P. 37-38) Opinion of Court (R. P. 45) From the middle of (R. P. 48) to the fourth ground of error on (R. P. 51) will be found the opinion of the Supreme Court of the State of New Mexico on the second and third grounds of error assigned upon appeal, the second raising the question of "former jeopardy" as a privilege and immunity secured to a citizen of the Territory of New Mexico, by the Constitution of the United States, and the third raising the question of deprivation of liberty without "due process of law" in that there was no valid jury trial, the latter also being a violation of the Constitution of the United States. That thereafter on the 26th day of May, 1913, there was filed by appellant Benito Lobato, in the Supreme Court of the State of New Mexico, a motion for a rehearing accompanied by brief, wherein it appears from grounds two to six, inclusive, (R. P. 39-40) that he resubmitted the question of "former

jeopardy," and that in grounds seven and eight of said motion he resubmitted the question of "Deprivation of liberty without due process of law" (R. P. 40-41). That thereafter on the 21st day of July, 1913, the said Supreme Court of the State of New Mexico handed down its opinion on said motion for rehearing, denying unto Appellant a rehearing on said constitutional questions, but modifying its former opinion as to the necessity of raising "former jeopardy" by a special plea in bar, where all the matters to support such a plea appeared upon the face of the record proper, and holding that such question could be raised by motion or any other appropriate method, but that it must be raised at the first opportunity, and holding that Appellant having failed to raise it except by motion at the close of plaintiff's caes waived his right to such immunity. (R. P. 54) That thereafter Appellant considering himself aggrieved by the decision above referred to sued out a writ of error in this court unto the Supreme Court of the State of New Mexico, and thereafter a transcript of record was duly filed with the clerk of the Supreme Court of the United States on the 7th day of May, 1915, thus bringing this cause into this court.

SPECIFICATIONS OF ERROR.

The Supreme Court of the State of New Mexico erred in affirming the verdict, sentence and judgment of the District Court of the County of Taos, Territory of New Mexico, in the following particulars:

1.

In holding and deciding against the right, privilege and immunity from twice being put in jeopardy of life and limb for the same offense, secured to a resident of the Territory of New Mexico by the Fifth Amendment of the Constitution of the United States, which said right, privilege and immunity was raised by Plaintiff in Error in the trial of said cause in the District Court of Taos County, Territory of New Mexico, by a motion made at the close of the case of the prosecution and before entering upon the defense, wherein the court's attention was called to the fact that the record proper in the identical case on trial disclosed that the defendant had once been in jeopardy, in that a jury had been duly selected, empanelled, accepted, charged and sworn to try the issues in said cause and had been thereafter dismissed, the said

proceedings being upon the same indictment, and in subsequently raising the same identical question in a motion in arrest of judgment, which said question was duly presented to the Supreme Court of the State of New Mexico on appeal and decided by said court adversely to this Plaintiff in Error upon the theory that where former jeopardy appears upon the face of the record it might be raised by motion, but that such question must be raised at the first opportunity and that Plaintiff in Error not having raised such question until the close of the case of the prosecution and prior to entering on his defense, it came too late, which said decision is a violation of the right, privilege and immunity secured by the Fifth Amendment of the Constitution of the United States.

2.

In holding and deciding "The third proposition discussed by appellant is that there was no valid jury empanelled and sworn to try the case, and therefore defendant was not accorded due process of law as required by the Constitution of the United States and the laws of New Mexico. * * * There is nothing in the record to show but that such jury was selected in the manner required by law." In that the court erroneously holds in substance that the record must disclose that there was no valid jury and that because the record fails to recite the facts which would constitute a valid jury, the same does not show that the jury was invalid, whereas in law the record must disclose every step required to constitute a valid jury and nothing can be read into the record and if the record fails in such recital and fails to disclose a valid jury, then, in law, there was no valid jury. The right to a trial by a valid common law jury in accordance with due process of law was specifically set up and claimed by defendant in the Supreme Court of New Mexico under the constitutional guaranty to a resident of the Territory of New Mexico. Which said decision of the Supreme Court of New Mexico was against said right so claimed and is a violation and in contravention of the Constitution of the United States.

ARGUMENT.

From the foregoing statement of the case and specifications of error, it will be seen that there are but two questions presented for discussion in this court; the first of

which is, whether the defendant was twice put in jeopardy of life and limb for the same offense, in the same cause and upon the same indictment; the second is whether any valid jury was selected, empanelled, accepted, charged and sworn to try the cause after the first jury which had been duly empanelled had been dismissed.

I.

THE DEFENDANT WAS TWICE PUT IN JEOPARDY OF LIFE AND LIMB FOR THE SAME OFFENSE, IN THE SAME CAUSE AND UPON THE SAME INDICTMENT.

In arguing the foregoing question it might be well to give a short resume of that portion of the record material to this first assignment of error. The plaintiff in error was indicted on the 9th day of May, 1910, in the District Court of the County of Taos, Territory of New Mexico, for murder and was upon the same day arraigned and entered a plea of not guilty. (R. P. 3) On the 24th day of May, 1911, the then defendant filed a demurrer to the indictment, which said demurrer was upon the same day duly argued by both counsel and submitted to the court and upon the conclusion of the arguments the same was overruled by the Court. (R. P. 13-14) Both parties announced themselves ready for trial and a jury of twelve men taken from the County of Taos was duly empanelled, selected, accepted, charged and sworn to try the issues in said cause and the witnesses for both sides were called and sworn and placed under the rule. (R. P. 14-15) That thereafter upon motion of the District Attorney the court dismissed the jury without the consent of the defendant, and without showing in the record any imperious necessity, but showing in the record that the jury was dismissed in order to do an unnecessary thing, that is, arraign the defendant and have him plead. (R. P. 15) That thereafter the defendant was arraigned and pleaded not guilty, and both parties announced themselves ready for trial and the clerk simply re-charged and re-swore the jury which had theretofore been dismissed. (R. P. 15) That thereafter upon the close of the taking of the testimony defendant moved the court to instruct the jury to find a verdict of not guilty, setting forth as the third ground of said motion that the record proper in said cause disclosed that the defendant had theretofore been placed in jeopardy in identically the same case and upon the same indictment in that a valid

jury had theretofore been duly selected, empanelled, accepted, charged and sworn to try the issues in said cause and had been dismissed without the consent of the defendant, such dismissal acting as an acquittal, which said motion was by the court duly overruled and exception taken by the defendant. (R.36-37) That thereafter at the conclusion of the case the same question was preserved in a motion in arrest of judgment and was subsequently presented to the Supreme Court of the Territory of New Mexico on appeal, which question so presented was subsequently passed upon by the Supreme Court of the State of New Mexico adverse to defendant.

On page fourteen of the Record we find the following:

> "And now again comes the attorney for said defendant and calls up for hearing the demurrer, heretofore filed on, to-wit, the 23rd day of May, to said indictment; whereupon the court hears the argument of counsel for and against said demurrer and being otherwise sufficiently advised in the premises, overrules the same.
>
> Whereupon both parties announce themselves ready for trial and now comes the jury as follows, to-wit:- (We here omit names of jurors) twelve good and lawful men taken from the body of the county of Taos and Territory of New Mexico, duly empanelled, selected, accepted and sworn to well and truly try the issues joined in the cause now pending, and a true verdict therein to render according to the law, the evidence and the instructions of the court.
>
> That thereupon the witnesses for both plaintiff and defendant were called, duly sworn and placed under the rule.
>
> That thereupon it appearing to E. C. Abbott, Esq., District Attorney, that defendant had not been arraigned and had not plead since the overruling of defendant's demurrer, upon motion the Court dismissed the jury and directed that defendant be arraigned and plead.
>
> Thereupon, upon the reading of the indictment herein to defendant, Benito Lovato in open court, for plea thereto says that he is 'not guilty' in manner and form as therein charged.
>
> And now the issues in the above entitled cause being joined, both parties again announce themselves

ready for trial, and now comes the jury as follows, to-wit: (We here omit names of jurors, but they are identically the same twelve jurors who had theretofore been dismissed) twelve good and lawful men taken from the body of the County of Taos and Territory of New Mexico, sworn to well and truly try the issues joined in the cause now pending, and a true verdict therein to render according to the law, the evidence and the instructions of the court."

It must be clear from the foregoing record matter that after the demurrer was overruled a jury was duly empanelled, sworn and charged to try the issues or charge contained in the indictment and that thereafter and after the witnesses had been sworn and placed under the rule the jury was dismissed. By an examination of the opinion of the Supreme Court of the State of New Mexico (R. P. 46-7-8) it will be seen that the indictment in this case is sufficient in form and substance to sustain a conviction.

Under the foregoing facts Plaintiff in Error contends:

(A) That the moment the jury was duly empanelled, selected, accepted, sworn and charged, defendant was placed in jeopardy.

(B) That the moment such jury was dismissed by the court, without the consent of defendant, and without imperious necessity, such dismissal is in law an acquittal.

(C) That when such jeopardy or constructive acquittal appears upon the face of the record proper the court must take judicial notice thereof without plea.

(D) That when such former jeopardy or constructive acquittal appears upon the face of the record proper it may be called to the court's attention at any time before final judgment or sentence, and in any convenient manner, such as by motion before verdict, arrest of judgment after verdict or by objection to the court pronouncing sentence, etc.

(E) That when such jeopardy, appearing upon the face of the record proper, has been called to the court's attention in some appropriate manner, and a privi-

lege or immunity is claimed under the Constitution of the United States, it is the court's duty to give effect to such constitutional immunity and put an end to the second trial.

(F) Application of foregoing doctrines to case at bar.

A.

THE MOMENT THE JURY WAS DULY EMPANELLED, SELECTED, ACCEPTED, SWORN AND CHARGED, DEFENDANT WAS PLACED IN JEOPARDY.

The principle of law that the moment a jury has been duly empanelled, selected, accepted, sworn and charged to try a cause in a court having jurisdiction, upon a sufficient indictment, jeopardy attaches, seems to have received the universal sanction of the courts. It is true, however, that several older decisions can be found wherein it has been held that jeopardy does not attach until there is a verdict of either acquittal or conviction by the jury. This older doctrine was the result of a confounding of the common law doctrine of *Autrefois acquit* or *convict*, both of which in their very terms presuppose a verdict by a jury, with the constitutional inhibition against being twice placed in jeopardy, which is a broader term than *Autrefois acquit* or *convict*, and which under certain conditions attaches regardless of whether there be a verdict or not.

Wharton's Criminal Pleading and Practice, (9th Edition) Secs. 490-491.

Regardless of what may have caused the confusion above pointed out, it requires but an examination of more recent authorities to convince the most skeptical that "jeopardy" as used in the Constitution of the United States attaches long prior to the reaching of a verdict in a criminal case.

In support of the foregoing doctrine we invite the court's attention to the following citations:

In *Bishop's New Criminal Law*, Vol. 1, Sec. 1015 (eighth edition), in speaking of jeopardy, the author says:

"While there is no jury set apart and sworn for the case, the defendant has not been conducted to his

jeopardy. But when, according to the better opinion, the jury is full, sworn, and added to the other branch of the court, and all the preliminary things of record are ready for the trial, the prisoner has reached the jeopardy from the repetition of which our constitutional guarantee protects him."

In the *Encyclopedia of United States Supreme Court Reports,* Vol. 2, Page 760, Sec. A, sub-div. 1, we find the following text:

"It is true that some of the definitions given by the text book writers, limit jeopardy to a second prosecution after verdict by a jury; but the weight of authority, as well as decisions of this court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him."

In Sub-div. 2 *Id.,* we find the following text:

"The empanelling and swearing the jury, and the statement of his case by the district attorney in a trial where indictments are consolidated, to be tried together, puts the prisoner in jeopardy with regard to all the offenses charged in the consolidated indictments, within the meaning of the fifth amendment of the constitution, so that he cannot be again tried for any of those offenses." Citing in support of the foregoing text:

Coleman vs. Tennessee, 97 U. S. 509;
Kepner vs. United States, 195 U. S. 100;
Ex Parte Biglow, 113 U. S. 328.

In *Cooley's Constitutional Limitations,* Pg. 467,(Seventh Edition), the author says:

"A person is in legal jeopardy when he is put upon trial before a court of competent jurisdiction upon an indicitment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance. And a jury is said to be thus charged when they have been empanelled and sworn."

In *State vs. Ward*, 48 Ark. 36-38, the court in speaking of jeopardy says:

> "It is the established rule that when a jury in a criminal case is empanelled and sworn in a court of competent jurisdiction to try the prisoner under an indictment sufficient in form and substance to sustain a conviction, he is in jeopardy."

In *State vs. Robinson*, 46 La. Ann. 769-773, the court in speaking of jeopardy says:

> "On the foregoing authorities we consider it a settled principle that after a jury has been set apart and sworn for the particular case, the defendant has been conducted to his period of jeopardy, and is entitled to the protection of the constitutional bar. * * *
>
> "The rule invoked and applied in this case is that where there is a completed jury duly empanelled and sworn to try the issue joined * * * the accused is, at the moment, placed in jeopardy."

In *People vs. Webb*, 38 Cal. 467-477, a case that is repeatedly cited by other courts, and which contains an array of authorities, both English and American, the court in speaking of jeopardy says:

> "Again, in the application of this principle, it is upon reason and authority quite as well established, that when a party is once placed upon his trial for a public offense, on a valid indictment, before a competent court, with a competent jury, duly empanelled, sworn and charged with the case, he has then reached and is placed in jeopardy, from a repetition of which upon the same indictment, or any other indictment for the same offense, this constitutional shield forever protects him."

In *Commonwealth vs. Fitzpatrick*, 1 L. R. A. 451-452, the Court in speaking of jeopardy says:

> "Jeopardy is the peril in which a defendant is put when he is regularly charged with crime before a tribunal properly organized and competent to try him. He must under such circumstances, submit the suf-

ficiency of his defense to the decision of a jury of his peers. He is in their hands, exposed to the danger of conviction with all its consequences; or in the language of the Bill of Rights, he is in jeopardy."

In *State vs. Kinghorn*, 56 Wash. 131-132, the court in speaking of jeopardy says:

> "There is a division of authority on the question as to when the period of jeopardy begins, but we think the better rule and the one supported by the decided weight of authority is that, when the accused has been placed upon trial in a court of competent jurisdiction on a sufficient indictment, before a jury legally impanelled and sworn, the constitutional peril has attached, * * *"

In *Teat vs. The State*, 53 Miss. 439-453, the Court in speaking of jeopardy says:

> "Without elaborating a question which has been so often and so exhaustively discussed, we feel no hesitation in announcing our concurrence in that line of decisions which hold that a party is placed in jeopardy whenever, upon a valid indictment, in a court of competent jurisdiction and before a legally constituted jury, his trial has been fairly entered upon; * * *"

Indeed the authorities seem so numerous on this question, that we deem it unnecessary to quote further therefrom, and will content ourselves by citing the court additional cases which seem to be directly in point:

Hilands vs. Com., 111 Penn. St. 1;
People vs. Horn, 70 Cal. 17-18;
Whitten vs. State, 61 Miss. 717-722;
Mitchell vs. State, 42 Ohio St. 383-393;
Morgan vs. State, 13 Ind. 215-216;
Wright vs. State, 5 Ind. 290-292.

In the case at bar, there can be no question but that, in accordance with the doctrine supported by the foregoing authorities, the defendant was placed in jeopardy prior to the dismissal of the jury, (R. P. 14-15).

We now pass to the question of the dismissal of the jury, and what effect such dismissal had upon the case.

B.

THE MOMENT THE JURY WAS DISMISSED BY THE COURT, WITHOUT THE CONSENT OF THE DEFENDANT, AND WITHOUT IMPERIOUS NECESSITY, SUCH DISMISSAL IS IN LAW AN ACQUITTAL.

It would indeed be an endless task to attempt to accumulate all of the authorities supporting the above doctrine. We shall therefore merely quote from a few authorities and cite the court to such others as in our opinion clearly etsablish the soundness of the above doctrine.

In *Bishop's New Criminal Procedure,* Vol. 2, Sec. 821, (Second Edition), the author says:

> "A discharge of the jury after jeopardy begun, without verdict or the prisoner's consent, operates in law as an acquittal."

In *Kansas vs. Allen,* 59 Kan. 758-760, the court in speaking of discharge of jury, says:

> "Good reason must exist for the discharge of the jury, and one which the law will recognize as an absolute necessity; and a discharge without sufficient reason operates as an acquittal."

In *McCorkle vs. State,* 14 Ind. 39-40, the court in speaking of discharge of jury, says:

> "The law is well settled that, the discharge of a jury in possession of a criminal cause, upon a valid indictment, not called for by imperious necessity, and without the consent of the defendant, operates as an acquittal, and bars a further trial."

In *Washington vs. Kinghorn,* 56 Wash. 131-132, a case wherein the facts are almost identical with the facts in the case at bar, the court in speaking of jeopardy and discharge of jury, among other things, says:

> "* * * and that a discharge of the jury without good cause and without the consent of the accused is equivalent to an acquittal."

For other cases supporting the foregoing doctrine see the folloowing:

O'Brien vs. Commonwealth, 9 Bush (Ky.) 333;
Miller vs. State, 8 Ind. 325;
Commonwealth vs. Cooke, 6 S. & R. 577;
Commonwealth vs. Clue, 3 Rawles R. 501;
State vs. Ganigues, 1 Hayw. (N. C.) 241;
In Re Spier, 1 Dever, 491;
State vs. Wamire, 16 Ind. 357;
People vs. Goodwin, 18 Johns. 187-204;
State vs. Tyson, 138 N. C. 627;
Nolan vs. State of Georgia, 55 Ga. 521;
Wright vs. State, 5 Ind. 290-292;
People vs. Barrett, 2 Am. Dec. 239-240;
Poage vs. State, 3 Ohio St. 229-238;
Ned vs. State, 7 Porter's Rep. 187;
State vs. Calendine, 8 Iowa, 288-290;
State vs. McKee, 21 Am. Dec. 499-501;
Dobbins vs. State, 14 Ohio St. 493-499;
Mahala vs. State, 10 Yerger's, 535;
McCauley vs. State, 26 Ala. 135-138;
Hines vs. State, 24 Ohio St. 134-138;
State vs. Turpin, 54 Oregon, 367-369;
Reese vs. State, 8 Ind. 416;
Williams vs. Commonwealth, 44 Am. Dec. 403-404;
State vs. Ward, 48 Ark. 36-38;
People vs. Webb, 38 Cal. 467-477;
Hilands vs. Commonwealth, 111 Penn. St. 1;
People vs. Horn, 70 Cal. 17-18;
Whitten vs. State, 61 Miss. 717-722;
Mitchell vs. State, 42 Ohio St. 383-393;
Ex Parte Ulrich, 42 Fed. 587-594;
U. S. vs. Shoemaker, 2 McClean, 114-115;
U. S. vs. Watson, 3 Benedict's Dis. Ct. Rep. 1;
U. S. vs. Perez, 9 Wheat. 579.

From the foregoing authorities it becomes evident that a discharge of a jury which has been duly empanelled, selected, sworn and charged, before verdict, without imperious necessity or the consent of the accused, acts as an acquittal. In the case at bar the jury was dismissed after it had been duly empanelled, selected, accepted, sworn and charged, prior to the rendering of any verdict. (R. P. 15) The record, however, shows in addition to the foregoing that the jury

was dismissed because the defendant had not been arraigned and plead after the overruling of the demurrer, and that such dismissal was upon motion of the District Attorney. The record fails to disclose that the defendant consented to such dismissal, but on the contrary, as we have heretofore pointed out, the defendant relied upon this very dismissal of the jury as the record matter showing former jeopardy. The only question, then remaining under this branch of the argument is, whether or not such dismissal was an absolute or imperious necessity; if this question be answered in the positive, then there was no jeopardy nor an acquittal; if answered in the negative, then defendant had been placed in jeopardy and the action of the court is in law tantamount to an acquittal.

As affirmatively establishing the doctrine that an arraignment and plea are not an absolute or imperious necessity we cite the court to the following:

Garland vs. Washington, 232 U. S. 642-645.

This case specifically overrules so much of the decision in the case of *Crain vs. U. S.*, 162 U. S. 625, as holds to the contrary.

State vs. Klasner, 145 Pac. 679-682.

The foregoing case is a New Mexico case. It cites and follows the opinion in the Garland case, and admits the incorrectness of the old doctrine, that an arraignment and plea were indispensable.

For other cases supporting the principle that a defendant who has once been arraigned and who has pleaded, and subsequently interposes a demurrer, which is overruled, and thereafter proceeds to trial without objection, waives the arraignment and plea, we cite the following:

People vs. Bradner, 107 N. Y. 1-10;
Lampshere vs. State, 114 Wis. 193;
Henscher vs. People, 16 Mich. 46;
State vs. Bowman, 78 Iowa, 520;
State vs. Thompson, 95 Iowa, 464;
State vs. Windstrand, 77 Iowa, 112;
Martin vs. People, 44 Ill. 476;
State vs. Straub, 16 Wash. 111;
Gamelly vs. State, 37 Ohio, 120;

State vs. Cassidy, 12 Kansas, 423;
State vs. Walton, 13 L. R. A. (N. S.) 811 and notes.

It appearing from the foregoing authorities that the jury in the case at bar was not dismissed as of absolute or imperious necessity, the doctrine heretofore advanced must prevail, and as the case now stands, the record proper shows upon its face that the defendant had been once placed in jeopardy and was entitled to an acquittal, and that after defendant was arraigned the second time and the second trial begun, he was twice placed in jeopardy upon the very same indictment.

We now pass to the question of how the constitutional immunity from twice being placed in jeopardy, where such former jeopardy appears upon the face of the record proper of the identical case on trial, shall be called to the court's attention.

C.

WHEN SUCH JEOPARDY OR CONSTRUCTIVE ACQUITTAL APPEARS UPON THE FACE OF THE RECORD PROPER, THE COURT MUST TAKE JUDICIAL NOTICE THEREOF WITHOUT PLEA.

The authorities in support of the foregoing doctrine may be well divided into three groups: 1—Whatever is of record in a case need not be pleaded. 2—Courts will take judicial notice of the record proper of the case on trial. 3—To plead former jeopardy, which appears upon the face of the record proper, by a special plea in bar, would be improper and idle, for the purpose of a plea in bar is to tender an issue of fact outside of the record and which requires proof to support it, whereas that which appears upon the face of the record proper is conclusive and binding upon the court.

In Vol. 16, *Ency. Pleading & Practice,* Pg. 565, Sec. 9, we find the following text:

> "Whatever is of record in the suit itself need not be pleaded. If a fact is established by the record a plea setting it up is idle. So it is incompetent for a party to plead in contradiction to the record itself in the same cause. The record itself stands as a perpetual estoppel of such a pleading, and the objection may be taken by demurrer to the plea, or perhaps the plea may be treated as a nullity."

In *People vs. Harding,* 19 N. W. 155, the court, in discussing a case wherein former jeopardy was raised by a plea, and the facts relied upon all appeared of record in the case, says:

> "The two special pleas have no office to perform in the case, and should have been stricken from the files. This is too plain to require either argument or illustration. The purpose of a plea is to tender an issue upon some fact not already in the case that proof may be taken in respect to it if the issue is accepted. If the fact is already in the case, the plea is idle, and it becomes an absurdity when the fact is not only established by the record of the court in the very case in which the plea is tendered, but so conclusively established that no averment to the contrary could be listened to or received. And such was the case here. The proceedings upon the former trials were recited in the record as much at large as they were or could be in the pleas, and the respondent was entitled to all the benefits which the law could give him, the facts so appearing. The prosecutor should therefore have moved to strike the pleas from the file instead of taking an idle issue upon them."

In *Foster vs. State,* 29 Tex. App. 543-544, the court in speaking of a special plea of former jeopardy, says:

> "The two trials, however, being in the same tribunal and in the same case, it seems that really a special plea of former conviction was not required to be pleaded, because the court would take judicial cognizance of all previous proceedings which had been taken in the case, and ascertaining that defendant had already once been tried and convicted, would abate a further prosecution because of such prior conviction."

In *State vs. Cross,* 29 S. E. 527-528 (W. Va.), the court in speaking of special pleas of former acquittal, says:

> "No plea of such former conviction of manslaughter was necessary; clearly not. Such plea could be necessary if the verdict had been in another court, or in the same court upon another indictment, because a plea would be necessary to present in this case ex-

> traneous matters from another record; but the court will take judicial notice, or, more correctly speaking, will look through the entire record of the case, and must take its steps with eyes open to all in the record which it is bound to see. * * * The defendant could avail himself of the former conviction against further prosecution by objection to being put on trial for a higher offense than manslaughter, before the second trial, or, after verdict on the second trial, he could do so, as he did, by motion in arrest of judgment, as this motion required the court to scan the record to discover any error in it, or anything preventing judgment on the second verdict."

In *George vs. State*, 80 N. W. 486-487 (Neb.), the court in speaking of a special plea in bar, says:

> "* * * we do not see the necessity for a plea in bar where, as in this case, the fact that the defendant has been once duly acquitted appears affirmatively on the face of the record. It is an elementary rule of pleading that it is not necessary to allege facts of which the court will take judicial notice. * * * To bring to the notice of the trial court, by a verified pleading, the fact that it was without jurisdiction or authority to try the accused again on the charge of larceny, would seem to be an idle and witless ceremony. It is the office of a plea in bar to bring new matters before the court, and not merely to present in another form the matters already inscribed on its records."

In the case of *In Re Bennett*, 84 Fed. 324-326, a case which is extremely fertile in its reasoning and enunciation of the law applicable to the case at bar, and to which we especially invite the court's attention, the court says:

> "If his acquittal had taken place in some other court, or upon another information or indictment in the same court, it would have been incumbent upon the petitioner, in order to avail himself of his constitutional right of protection against being twice placed in jeopardy, to have specially pleaded such defense, and upon the trial to have exhibited evidence in support thereof, for in no other way could the court have

> been judicially informed of the facts, constituting a bar to a second trial; but, in the proceeding in which the petitioner was convicted, no such plea or evidence was necessary, because the court itself was bound to take judicial notice of every step shown by its own record to have been taken in the prosecution of the case before it,—notice not only of the petitioner's arraignment and of his plea upon such arraignment, but also of the verdict rendered upon the former trial of the same case, and entered upon the record of the court as a perpetual memorial of its rendition; and having judicial knowledge of such facts, the court was bound to know that, under the constitution, it no longer had jurisdiction to retry the petitioner for the offense of which he had been acquitted by such former verdict."

It is true the above case is somewhat different from the case at bar, but the principles of law announced are applicable to both cases. It is also true that in the Bennett case the immunity relied upon was one growing out of the fourteenth amendment of the Constitution of the United States, whereas the immunity claimed in the case at bar grows out of the fifth amendment, New Mexico being a Territory and not a State at the time the immunity was claimed. However, the discussion in the Bennett case is still stronger when applied to the fifth amendment.

For other authorities supporting the doctrines announced in the cases last cited, we refer the court to:

People vs. Taylor, 76 *N. W.* 158 (*Mich.*)
Robinson vs. State, 21 *Tex. App.* 160-162.
State vs. Bowen, 16 *Kan.* 475-477.
Worlds Col. Expo. Co. vs. Lehigh, 94 *Ill. App.* 433.
Kansas vs. Stevens, 56 *Kan.* 720.
Nat. Bank of Monticello vs. Bryant, 13 *Ky.* 419.
Hollenbach vs. Schnabel, 101 *Calif.* 312-315.
State vs. Bates, 61 *Pac.* 905 (*Utah*).
State vs. Jackson, 106 *Mo.* 174-177.
Brucker vs. State, 19 *Wis.* 566-577.
State vs. Daugherty, 106 *Mo.* 182-187.
Tweedy vs. Jarvis, 27 *Conn.* 42-47.
Poole, Gilliam & Co. vs. Seney, 70 *Ia.* 275.
Dawson vs. Dawson, 29 *Mo. App.* 521.
Bank of Montreal vs. Taylor, 86 *Ill. App.* 388.

In the case at bar there can be no question but that all that the defendant relied upon appeared upon the face of the record proper. Defendant's motion specifically calls the court's attention to the fact that the record proper discloses former jeopardy, thereby eliminating the possibility of the introduction of any extrinsic evidence. The two trials, if such they may be called for want of a better term, were had in the same court, in the same case and upon the same indictment and there was but one record with which we are concerned. (R. P. 14-15-36-37.) This then brings the case at bar squarely within the foregoing authorities. We now pass to the question of how the immunity from second jeopardy is to be called to the court's attention and at what stage of the case.

D.

WHEN SUCH FORMER JEOPARDY OR CONSTRUCTIVE ACQUITTAL APPEARS UPON THE FACE OF THE RECORD PROPER IT MAY BE CALLED TO THE COURT'S ATTENTION AT ANY TIME BEFORE FINAL JUDGMENT OR SENTENCE, AND IN ANY CONVENIENT MANNER, SUCH AS BY MOTION BEFORE VERDICT, ARREST OF JUDGMENT AFTER VERDICT OR BY OBJECTION TO THE COURT PRONOUNCING SENTENCE, ETC.

In *Bishop's New Criminal Procedure*, Vol. 2, second edition, pages 637-638-639, section 821 et seq., the author in discussing the methods to be followed where the pleas of *Autrefois Convict* and *Autrefois Acquit* are not available, says:

> Sec. 821. "A discharge of the jury after jeopardy begun, without verdict or the prisoner's consent, operates in law as an acquittal; and on motion, without plea, he is entitled to be set at liberty."
>
> Sec. 825. "In England, on the discharge of a jury without verdict or the prisoner's consent, he is deemed entitled, as of right, to have the record so made up as to show the facts in detail. He can then, relying on it, apply to have judgment entered for him, and to be discharged; or after conviction upon a second trial, he can move in arrest of judgment; or, after sentence, he can bring a writ of error. On principle, the correctness of this procedure seems plain."
>
> Sec. 826. "With us, while we have decisions to the proposition that the court's unauthorized stopping of the trial without a verdict is in law an acquittal, the

> question of the power to compel the putting of the facts into the record has not in any of the cases before the author been considered. Still, in principle, a party has always the right to have a fact vital to his interests in a case appear of record; since the record is for the benefit of the parties, who are not protected unless it is as full as they reasonably demand. Practically as written up by the clerk, it omits much which by common consent is not important. But when one is proposing to rely on what is done, in a proceeding to be instituted, everything which he wishes to avail himself of becomes material, whatever it's effect is finally adjudged to be. Assuming the record to be so made as to show the facts, it is plainly within the American doctrine to give it effect without the help of a plea."

In *State vs. Cross*, 29 S. E. 527-528 (W. Va.), where it appeared on the face of the record proper that the defendant had been twice placed in jeopardy on the same indictment and in the same court, the court says:

> "The defendant could avail himself of the former conviction against further prosecution by objection to being put on trial for a higher offense, than manslaughter, before the second trial, or, after verdict on the second trial, he could do so, as he did, by motion in arrest of judgment, as this motion required the court to scan the record to discover any error in it, or anything preventing judgment on the second verdict."

In support of the contention made in this portion of our brief, we cite the court to the case of *In Re Bennett*, 84 Fed. 324, and regret very much that we are unable to quote from any particular portion of the opinion. This case, in effect, holds that where the former acquittal appears upon the face of the record, that no special plea in bar is necessary, and that the right of a person, after acquittal, to be exempt from the jeopardy of being again placed upon trial in the same court, and upon the same indictment for the identical offense, is secured to a citizen of a state by the fourteenth amendment of the constitution, and that a second judgment is absolutely void, and that such right or immunity will be enforced and respected when called to the court's attention. It must be borne in mind that the fourteenth amendment only seeks to preserve unto a citizen of a state the same rights and immuni-

ties in a state court, as the fourth and fifth amendments preserve to a citizen in the federal courts. It must also be borne in mind that New Mexico was a territory at the time this case was tried, and that the fifth amendment applies to territories. It must be clear from the foregoing that any judgment or verdict that is void and subject to collateral attack may be called to the attention of the court at any time and in any manner. Indeed, an error or a lack of jurisdiction appearing upon the face of the record can properly be raised by a motion in arrest of judgment for the first time. It would seem as we have heretofore shown, that this is one of the methods available under the Common Law, and certain it is that in New Mexico, the purpose of a motion in arrest of judgment, is to call to the court's attention, after verdict, any error or want of jurisdiction appearing upon the face of the record.

Gildersleeve vs. Water & Imp. Co., 4 N. M. 318-322; *New Mexico Codification* 1915, Sec. 1407.

It has been settled that motions in arrest of judgment shall be entertained in New Mexico, both in civil and criminal cases.

Territory vs. Anderson, 4 New Mexico, 213-228.

By statute the common law is adopted in New Mexico as the rule of practice and decision.

New Mexico Codification 1915, Sec. 1355.

There can be no question, and we apprehend the point will not be controverted, that under the common law a motion in arrest of judgment had for its object the pointing out of error or the want of jurisdiction, appearing upon the face of the record proper.

From the foregoing we think it is conclusively established that the defendant in the case at bar, raised the constitutional question of former jeopardy or former acquittal in the correct manner. He first raised the question by motion, (R. P. 36-37) he then again raised the same identical question in his motion for a new trial and in arrest of judgment. (R. P. 25) We now pass to the next point.

E.

THAT WHEN SUCH JEOPADY, APPEARING UPON THE FACE OF THE RECORD PROPER, HAS BEEN CALLED TO THE COURT'S ATTENTION IN SOME APPROPRIATE MANNER, AND A PRIVILEGE OR IMMUNITY IS CLAIMED UNDER THE CONSTITUTION OF THE UNITED STATES, IT IS THE COURT'S DUTY TO GIVE EFFECT TO SUCH CONSTITUTIONAL IMMUNITY AND PUT AN END TO THE SECOND TRIAL.

We here again especially call the Court's attention to the case of *In Re Bennett*, 84 Fed. 324. There can be no question that if a judgment or verdict or proceeding is void, or the court has no jurisdiction to act, and such facts appear upon the face of the record, that the court must stay further proceedings when such facts are called to the court's attention. This fact indeed is too elementary to require authority. We, however, here again cite the court to all of the authorities cited under sub-divisions A. B. C. and D of this brief. We now pass to the application of the foregoing doctrines to the case at bar.

F.

APPLICATION OF FOREGOING DOCTRINES TO THE CASE AT BAR.

By an examination of the opinion of the Supreme Court of the State of New Mexico in the case at bar, (R. P. 45-48) it will be seen that the court distinctly held that former jeopardy could only be raised by a special plea in bar. The Supreme Court based its decision upon the case of *People vs. Bennett*, 114 Cal., p. 56, and other cases. Upon a motion for rehearing filed by the defendant in the Supreme Court of New Mexico, (R. P. 38) defendant called to the Court's attention many of the authorities heretofore cited in this brief and in addition pointed out that the case of *People vs Bennett, supra*, has absolutely no application to the case at bar and is not a case in point in any manner whatsoever. Defendant pointed out that this case turned upon a statute (Vol. 4 *Deering's Cal. Pen. Code*, secs. 1016-1017 and 1020). These sections specify the different kinds of pleas, how they must be pleaded and what is raised by each plea. Setction 1016, *id.*, shows conclusively that in California there are four distinct pleas, guilty, not guilty, former acquittal or conviction and once in jeopardy. Section 1020, *id.*, provides just what may be given in evidence under the plea of

not guilty and specifically excludes former conviction or acquittal and once in jeopardy. From the foregoing it must be evident that the practice in California is purely statutory and from what we have heretofore pointed out is in derogation of the common law. Many of the other cases cited by the Supreme Court of the State of New Mexico in its said opinion were cases where former jeopardy was sought to be raised, but where there were two indictments or where the proceedings were had in two different courts and where it became essential to establish the former jeopardy by extrinsic evidence. These cases are indeed different from the case at bar for in the case at bar there was but one record. The two proceedings were upon the same indictment, there was an identity of parties, identity of cause, identity of court and the same evidence would have been necessary upon either trial, and all of the facts appeared upon the face of the record and required no extrinsic evidence to establish the former jeopardy. When these facts were called to the attention of the Supreme Court of the State of New Mexico upon the motion for a rehearing, the Supreme Court in its opinion on said rehearing (R. P. 54-55) receded from its former opinion and held that all of the questions appearing of record in the same case, made it unnecessary for a special plea in bar to be filed and that such question could be raised by motion. The Supreme Court of New Mexico, however, changed its position and held that former jeopardy may be raised where the facts upon which said plea are based appear of record in the same case, by a plea in bar, or by motion for discharge of the defendant, or by objecting to entering upon the second trial, or in any other appropriate manner by which the matter is called to the attention of the trial court, but that such question must be raised at the first opportunity. The court then proceeded to hold that in the case at bar the question not having been raised until the state had concluded its case, it came too late, thus holding that because the defendant did not prior to the commencement of the second trial raise the question of former jeopardy, that he waived it. It must be borne in mind that the Supreme Court in its decision on said motion for rehearing admits that former jeopardy, where all the facts appear upon the face of the record proper, may be raised in different ways; they include among such methods, by motion or any other appropriate manner. We have clearly shown heretofore that a motion in arrest of judgment is an appropriate manner to raise such question under the given conditions.

Such being the case, how is it possible for the Supreme Cou of New Mexico to say that defendant waived his constitu tional rights by not raising the question by motion or othe wise at an earlier stage of the trial? Certainly, a motio in arrest of judgment cannot be filed until after verdic From a careful study of the opinion on rehearing it woul seem that the Supreme Court only considered one metho and overlooked the fact that defendant raised the questio both by motion at the close of the case of the prosecutio and by motion in arrest of judgment after verdict.

Again we find that the Supreme Court of the State of Ne Mexico based its decision on the motion for rehearing upo the text taken from *State vs. White*, 71 Kans. 356, and th note in 6 A. & E. Annotated Cases, 132. We have very care fully studied the above case. We there find that where a of the matters relied upon as constituting former jeopard appear upon the face of the record, a special plea is unneces sary and that the court will take notice of such fact from it record, and determine their proper legal effect. The Whit case, however, proceeds upon the theory that the fore going immunity from second jeopardy granted by th constitution is a personal privilege and that the accuse may waive a personal privilege. In support of thi position the opinion in the White case cites several Kansa decisions. It must be borne in mind that we have nothin here to do with the Kansas Constitution. We are dealin solely with the Constitution of the United States as it i applicable to a Territory, and the decisions of the Suprem Court of the United States interpreting the Constitution o the United States should indeed be more in point in th case at bar than decisions by the Supreme Court of the Stat of Kansas, which deal only with the Constitution of the Stat of Kansas. It would seem to us that the Supreme Court o the United States has positively settled the question in th case of *Hans Nielson, Petitioner*, 131 U. S. 176, that wher former jeopardy appears upon the face of the record it is jurisdictional limitation and not a personal privilege. Thi same position was taken in the case of *In Re Bennett*, 8 Fed. 324. It would also seem that the Supreme Court of th United States has definitely settled the question that certai things can never be waived by a defendant on trial in criminal case. In the case of *Hopt vs. Utah*, 110 U. S. 57 it was held that neither the life nor liberty of a person coul be taken except in the mode prescribed by law and that whic the law makes essential in the proceedings involving the d

privation of life and liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure when on trial and in custody, to object to unauthorized methods. Most certainly, considering the constitution in the light of a limitation against twice being placed in jeopardy, it would at least be depriving a person of his liberty by unauthorized methods, to hold that he waives his immunity from second jeopardy, where the same appears upon the face of the record, simply because he did not object to the second trial before the trial of the case commenced. We cannot understand upon what theory the court held as it did in the case of *State vs. White, id.* The annotator in 6 A. & E. Annotated Cases, page 134, has accumulated a great number of cases under different note heads. We will quote the note heads and then comment upon the cases and point out that not a single case there accumulated supports the doctrine laid down in the White case.

We first find:

> "Failure to interpose objection of former jeopardy on second trial as waiver of plea—It has been held in a number of cases that a person accused of crime waives his privilege of immunity from second jeopardy by failing to plead or otherwise set up the former jeopardy when he is arraigned in the second prosecution."

We have examined every case cited by the annotator in support of the foregoing text and we find that nearly every case turns upon a statute which prescribes the various kinds of pleas that may be filed in criminal cases and when they may be filed, thus requiring former jeopardy or *autrefois acquit* or *convict* to be filed prior to the general plea of not guilty. Naturally under such a statute entering a plea of not guilty and going to trial upon the general issues must waive the special pleas which the statute requires must precede the general issue. Other cases cited are entirely different from the one at bar. They are cases where the former jeopardy or *autrefois acquit* or *convict* arose upon a different indictment or in another court, etc., requiring extrinsic proof to establish former jeopardy. In the case at bar, however, the matter is all of record and before the court all the time. We admit that, were not the matters of record that it would require a special plea in bar.

In the next note we find:

> "Thus if no plea of former conviction has been interposed, the defense cannot be raised during the taking of the testimony."

The cases cited by the annotator in support of the foregoing are practically the same cases cited in support of the last note. They are therefore entirely different from the question now before the court and in no wise set a precedent for a case of this character. In the next note the annotator, however, recognizes the distinction between cases referred to in the last two notes and cases of the character of the one at bar. We find:

> "The defense of former jeopardy need not be specially pleaded on a second trial upon the same indictment in the same court, when the evidence of conviction or acquittal is before the court as part of its own record of the case, since it will take judicial cognizance of such record."

The authorities cited in support of this note have been heretofore cited by us in conjunction with a great mass of authorities not cited in this note.

From the foregoing it would seem clear that the Supreme Court of New Mexico in its opinion upon the motion for a rehearing must have failed to draw the distinction between a special plea in bar where it requires extrinsic proof to establish former jeopardy and former jeopardy appearing absolutely upon the face of the record. This becomes evident when we examine the opinion of the Supreme Court of New Mexico. We there find:

> "A very interesting discussion of the question will be found in a case note to the case of *State v. White*, 6 A. & E. Annotated cases, 132. The author says: 'It has been held in a number of cases that a person accused of crime waives his privilege of immunity from second jeopardy by failing to plead or otherwise set up the former jeopardy when he is arraigned in the second prosecution. The text is supported by numerous adjudicated cases.' "

From the foregoing it must be evident that the Supreme Court of New Mexico only read the Kansas case and did not read the cases in the first and second notes to determine

whether or not they were cases in point. It also becomes evident that they never read the cases cited under the third note, which are cases similar to the one at bar.

Another interesting case is the case of *Crain v. U. S.*, 162 U. S. 644. We there find:

> "Before a court of last resort affirms a judgment of conviction of, at least an infamous crime, it should appear affirmatively from the record that every step necessary to the validity of a sentence has been taken. * * * And the record of his conviction should show distinctly, and not by inference merely, that every step involved in due process of law and essential to a valid trial, was taken in the trial court; otherwise the judgment will be erroneous."

Can it be said that the record in the case at bar shows distinctly without inference that every step involved in due process of law and essential to a valid trial has been taken? Does not the record on its face, as we have heretofore shown, positively show a former acquittal? Is not the defendant protected by the Constitution of the United States against second jeopardy? Have we not shown that the court had no jurisdiction to enter upon the second trial, and does not the Crain case say that such a judgment will be erroneous? We apprehend that the Crain case has indeed been overruled in part by the case of *Garland vs. State of Washington*, 232, U. S. 642, but the Garland case very distinctly overrules only a portion of the Crain case and in effect it reaffirms the Crain case on all other matters except those pertaining to the necessity of arraignment and plea. It will not be amiss to here point out to the court that in New Mexico we have a statute relative to former jeopardy. The Compiled Laws of New Mexico, 1897, section 1049, reads as follows:

> "No person shall be held to answer on a second indictment for an offense of which he has been acquitted by the jury, upon the facts and merits of a former trial, but such acquittal may be pleaded by him in bar of any subsequent prosecution for the same offense, notwithstanding any defect in the form or in the substance of the indictment on which he was acquitted."

It must be noted that this statute requires a plea in bar to be filed under certain conditions, that is, where the de-

fendant is being proceeded against on a second indictment for an offense of which he has been acquitted by a jury upon a trial had upon the merits. This is a special statute for special purposes and were our case at bar one falling within the provisions it would most certainly require a special plea in bar, but in the case at bar, the trial was upon the same indictment in the same court; there was no verdict by the jury and the constructive acquittal was not based upon a full trial on the merits. It is clear, therefore, that the statute is not applicable to the case at bar. This is the only statute we have in New Mexico. We are therefore forced back to the common law for our procedure and, as we have heretofore shown, under the common law and in all states still retaining the common law procedure, a plea is unnecessary, where the record upon its face discloses the jeopardy.

The Supreme Court of New Mexico in its opinion, as we have heretofore pointed out, held that because we did not call the former jeopardy to the court's attention at the first opportunity that we therefore waived it. The Supreme Court has erroneously taken it for granted that we did not avail ourselves of former jeopardy at the first opportunity. Let us revert to the record. (R. P. 14) It will here be seen that on May 21, 1911, the following proceedings were had and entered of record. We here find that a motion for continuance was argued and overruled, that a demurrer was argued and overruled, that a jury was duly selected, accepted, empanelled, sworn and charged to try the case. That the witnesses for both sides were sworn and placed under the rule, that thereupon the State moved that the jury be dismissed because there had been no arraignment and that immediately following this the issues in the above cause being joined now comes the jury as follows, to-wit: (here naming the jurors) twelve good and lawful men taken from the body of the County of Taos, etc.; they hear a portion of the evidence and retire in care and custody of a bailiff for the night. (R. P. 15-16) We here find that on the following day, May 25, 1911, the Territory introduces evidence in chief and rests. At this point the defendant, as we have heretofore shown, (R. P. 36-37) moved for an instructed verdict on the grounds of the record disclosing former jeopardy. The court must be aware of the fact that the record of the proceedings in a court are not transcribed into the record just as they occur. The records are prepared by the Clerk of the Court after the court has adjourned for the day and are by the clerk read to the court the following day. It thus becomes evi-

dent that until May 25, 1911, there was no approved court record. When the record was approved on that day and immediately upon the prosecution resting its case in chief, the defendant took advantage of that record basing his immunity of former jeopardy upon the record of the court as it had been presented on the 25th of May, 1911. Defendant availed himself of the right at the very earliest opportunity he had. He availed himself of his right as soon as there was a record to rely upon. Had he attempted to raise the question before the record was complete he would have been compelled to do it by extrinsic evidence. We therefore contend that with the knowledge the Supreme Court of New Mexico has regarding the making up of the records of the court it should have known that defendant availed himself of his rights the first opportunity he had after the record of the court had been written up and approved. This we think again disposes of the view the Supreme Court took of this question.

It will be noted by an examination of the opinion of the Supreme Court of New Mexico in the case at bar that it did not actually pass upon the constitutional question raised, but dodged this question and disposed of it by claiming that it had not been sufficiently presented to the court or properly pleaded. We do not apprehend that opposing counsel has or will contend that this deprives the Supreme Court of the United States of jurisdiction; still it might not be amiss here to call the court's attention to the fact that the Supreme Court of the United States has repeatedly held that where a constitutional immunity has been clearly and distinctly raised in the trial court and the same question has been presented to the Supreme Court of the State and the Supreme Court of the State has disposed of the matter on the question of whether or not it has been sufficiently pleaded and holds adversely to the appellant, that the opinion or ruling of the Supreme Court of the State is itself a constitutional question.

Erie Ry. Co. vs. Purdy, 185 U. S. 148-152, and cases there cited.

Mo., Kansas, etc., Ry. Co. vs. Elliott, 184 U. S. 530-533.

In conclusion of this portion of our brief based upon the first specification of error, to-wit, that of former jeopardy, we think it must be apparent from the authorities heretofore pointed out and the arguments presented that in a court

of the Territory of New Mexico plaintiff in error properly presented and raised the constitutional question relied upon and properly asserted his rights and claimed his immunity in the proper manner and that the Supreme Court of the State of New Mexico has misconstrued the law applicable to the case and has thereby committed grave and reversible error. We here call the court's attention to the fact that the Attorney General of the State of New Mexico filed his brief in advance of the brief of the plaintiff in error and inasmuch as plaintiff in error will have no further opportunity to meet the arguments therein presented we here point out the following: On page four of Mr. Clancy's brief he claims that the position taken by the plaintiff in error that a discharge of the jury after the same has been properly empanelled and sworn constituted jeopardy and that such discharge of the jury must operate as a release and acquittal of the defendant is unsound. He cites two authorities in support of his statement, to-wit, *Territory v. Gonzales,* 13 N. M. 94, 97, and *U. S. v. Aurandt,* 15 N. M. 292. 297. Mr. Clancy argues that no jeopardy attaches until an issue has been made up by a plea and contends that the two foregoing cases establish this principle of law. It is indeed true that these two cases do hold as the Attorney General says, but if the court will read the case of *Territory v. Gonzales,* above referred to, it will readily see that it was based upon the famous Crain case and if it will read the second case, the Aurandt case, it will see that this was based on the Gonzales case. It will be borne in mind, as we have heretofore pointed out, that the Crain case was distinctly overruled by the Garland case and that subsequent in time to both the Gonzales and Aurandt cases the Supreme Court of New Mexico reversed both of these cases in the case of *State v. Klasner,* 145 Pac. 679-682, thus directly following the Garland case. We do not know whether the Attorney General was aware of this condition, but we are certain that he could not have been for he would never have cited the Gonzales and Aurandt cases had he known that they had been distinctly reversed by the Supreme Court of New Mexico. On page five of Mr. Clancy's brief he says that the action of the court in passing upon the demurrer had no effect upon the previous plea and joinder of issues which remained in full force and that there was no need of any new arraignment and plea. Whether his premises are correct or not is immaterial; it is sufficient to say that if his argument is sound, then most certainly there was no imperious neces-

sity for a dismissal of the jury and a dismissal of the jury without imperious necessity or the consent of the accused is, as we have heretofore pointed out, an absolute acquittal. On page five of Mr. Clancy's brief he suggests that the record does not distinctly indicate that the court discharged the jury from consideration of the case before the defendant was re-arraigned, nor does it distinctly indicate that after the unnecessary rearraignment and plea the jury was again sworn. We can only say in reply to this suggestion that on R. P. 14-15 we have the full recital of the empanelling, selecting, accepting, charging and swearing of a common law jury; that the record immediately following this distinctly says, "upon motion the Court dismissed the jury." Immediately following this we find the following:

> "And now the issues in the above entitled cause being joined both parties again announce themselves ready for trial and now comes the jury as follows, to-wit: * * * twelve good and lawful men taken from the body of the County of Taos and Territory of New Mexico, sworn to well and truly try the issues joined in the cause now pending."

If, as Mr. Clancy suggests, the Court did not discharge this jury, why the second recitals as to the coming of the jury and the particularity of the record in regard to the first jury being dismissed because there was no issue joined and why the second recital that the second jury was sworn to try the issues joined? If Mr. Clancy's position were correct all the record would show would be the empanelling of the jury in the first instance, followed by an arraignment of the defendant and the trial proceed in ordinary manner. There would be no second jury. It requires but a reference to the cases of *Territory v. Gonzales* and *U. S. v. Aurandt,* above referred to, to point out what the court was attempting to do. Both of these cases distinctly held that without an issue joined there could be no valid trial and the Aurandt case held that where a jury had been empanelled and sworn before issues joined, that after an arraignment and plea the jury had to be selected *de novo* and the case begun all over. Both the court and the prosecuting attorney knew of these two decisions and they framed their proceedings accordingly, neither one of them appreciating the fact that the law as laid down by these two cases was not good law and must be reversed whenever the questions

were again presented to the Supreme Court. The two decisions are, however, of interest in so much as they give us a positive assurance of just what the trial court and the prosecuting attorney endeavored to do and why the record was so minutely and scrupulously prepared. We quite agree with Mr. Clancy that we are limited to what we find in the record. We do not ask the Court to go outside of that record. We have confined ourselves to it at all times in our brief. We have read nothing in the record. We have inferred nothing. Still, our opponent contends that our argument is based on inference, inferring something which does not exist upon the face of the record. Even were Mr. Clancy's argument correct, he misapplies the law. We apprehend that in the case of *Crain v. U. S.*, 162 U. S. 644, the court distinctly laid down the rule that it should affirmatively appear from the record that every step necessary to the validity of the sentence has been taken and the record of his conviction should show distinctly and not by inference merely that every step involved in due process of law and essential to a valid trial was taken in the trial court. In order to support Mr. Clancy's argument you must give the record an interpretation based upon inference. If you read the record the way it is written it is most certainly clear and unambiguous. We contend that the record does not affirmatively show every step necessary to a valid trial, but on the contrary shows upon its face that the second trial was absolutely void. We do not apprehend that the Attorney General of this State seeks to draw any distinction between the words "dismissed" and "discharged." We have hunted in vain for any decision or any definition which draws a distinction, or still better, draws a distinction that a jury which is dismissed is not discharged. Most certain it is that in the great number of cases we have cited heretofore the words "discharge" and "dismiss" have by various courts been used interchangeably. As an interesting factor in this discussion we call the court's attention to R. P. 16, immediately following the verdict of the jury. We there find the following:

"The jury is excused with thanks of the Court."

We here find that it was not the custom of the trial court to use the word "discharge," for instead of using that word at the close of the case when the jury has finished its labor he has simply excused them. It must from the fore-

going be evident that "discharge," "dismiss" and "excuse" are synonymous terms.

On pave seven of his brief the Attorney General suggests that the counsel for defendant in the trial court is guilty of lack of good faith in his dealings with the court and he cites a New Mexico statute. We have but to say in reply to this that C. C. Catron was the attorney in the District Court and in the Supreme Court of the State of New Mexico. That T. B. Catron is attorney for plaintiff in error in the Supreme Court of the United States; that from an examination of the record in this case nowhere can there be found even a suggestion where C. C. Catron has attempted to mislead the court by any artifice, false statement or untruth and as far as being subjected to criticism contained in the case of *Territory v. Pettine,* 16 N. M. 51, we simply state that this case was reversed by the Circuit Court of Appeals, *Pettine v. Territory of New Mexico,* 201 Federal 497.

It is not the duty of an attorney who is employed to defend a person accused of murder to advise the court what it should do. If the court chooses to take certain actions and he commits error in doing so it is the absolute right of the defendant and his attorney to take advantage of such error. Indeed, it would be a violation of the duty of an attorney to his client to fail to take advantage of such error.

We respectfully submit that upon this first specification of error there can be no question but that the trial court and the Supreme Court of the State of New Mexico deprived the plaintiff in error of his constitutional right.

We now pass to the second specification of error.

II.

The question to be discussed under the second specification of error is that there was no valid common law jury selected, accepted, empanelled, charged and sworn to try the case at bar in accordance with the Constitution of the United States and the laws of the Territory of New Mexico.

On R. P. 14-15 it will be found that now come twelve good and lawful men taken from the body of the County of Taos and Territory of New Mexico duly *empanelled,* selected, accepted and sworn to well and truly try the issues in the cause now pending. Immediately following this, as we have heretofore shown, it will be found that this jury was dismissed. The record then proceeds after the dismissal and after a subsequent arraignment:

> "And now the issues in the above entitled cause being joined, both parties again announce themselves ready for trial, and now comes the jury as follows, to-wit: * * * (Names of jurors omitted) twelve good and lawful men taken from the body of the County of Taos and Territory of New Mexico, sworn to well and truly try the issues joined in the cause now pending and a true verdict therein to render according to law, the evidence and the instructions of the court."

It will here be noted that nowhere in the record is there any recital that this second jury was duly selected, accepted, or empanelled. All the record says is that they were sworn to try the cause. We apprehend that a common law jury is one which has been duly selected, accepted, empanelled and charged to try the issues in the cause pending. We apprehend that the Constitution of the United States secures unto a citizen of the Territory of New Mexico the right to a jury trial in all criminal cases and that the jury referred to in said Constitution has uniformly been held to be a common law jury.

We appreciate the fact that the argument we are about to make is based entirely upon the premises that the court dismissed or discharged the first jury.

The Territory of New Mexico has the following statute relative to the empanelling and accepting of a jury. (Compiled Laws New Mexico, 1897, S. 995). It follows:

> "At the opening of the court the clerk must prepare separate ballots, containing the names of the persons returned as jurors, which must be folded as nearly alike as possible, and so that the same cannot be seen, and must deposit them in a sufficient box."

Section 997, *id.*, reads:

> "Before the name of any juror is drawn the box must be closed and shaken, so as to intermingle the ballots therein; the clerks must then, without looking at the ballots draw them from the box, through a hole in the lid, so large only as conveniently to admit the hand."

Section 998, *id.*, reads as follows:

> "When the jury is completed, the ballots containing the names of the jurors sworn, must be laid aside and kept apart from the ballots containing the names of the other jurors until the jury so sworn is discharged."

Section 999, *id.*, reads:

> "After the jury are so discharged, the ballots containing their names must be again folded and returned to the box, and so on, as often as a trial is had."

It will be seen from the foregoing that the method of drawing a jury is specifically provided for by statute in the Territory of New Mexico. If we examine R. P. 14-15 it will there be found that the first jury was dismissed. This first jury the record recites was duly empanelled, accepted and sworn. The record then recites after the dismissal of the first jury:

> "Now comes the jury as follows:"

and identically the same twelve jurors who were dismissed come back as jurors, but the record only shows that they were sworn; in no instance does it show that they were duly selected, empanelled or accepted. Can the Court conceive of the names of twenty-four jurors being in the box and the same identical twelve being drawn, empanelled, selected, accepted and sworn in identically the same order in two different trials? The record of the second jury shows that it was irregular in that it was never duly empanelled, selected or accepted. The Supreme Court of New Mexico in its opinion (R. P. 45-51) says:

> "Appellant relies upon the fact that the jurors so selected and empanelled were the same jurors theretofore selected and dismissed by the court so that the defendant could be rearraigned. There is nothing in the record to show but that such jury was selected in the manner required by law and no objection or question appears to have been raised by appellant at the time."

The court is in error, because we have never contended that the second jury was ever selected or empanelled. Our

very contention is that the record shows that it never was selected or empanelled. The Court, however, does state that there is nothing in the record to show but that such jury was selected in the manner required by law. As we have pointed out the record discloses facts which make it a physical impossibility for the court and the clerk of the court to have ever complied with the sections of the New Mexico statutes above quoted. They could not comply with the statutes and draw the same men in the same order. It is true that the record fails to disclose that the defendant raised any objection to this jury at the time. It may indeed be that the attorney for defendant was relying so confidently upon his immunity from second jeopardy which he would raise as soon as the record of the court had been presented and approved that he cared but little what kind of a jury he had or how that jury was obtained. Be this as it may, the present attorney was not the trial attorney and can go no further than the facts disclosed in the record permit. The Supreme Court of the State of New Mexico says that there is nothing in the record to show but that such jury was selected in the manner required by law. We take it that this is a decision by the Supreme Court of New Mexico on the constitutional question presented. The Supreme Court has therefore passed on the question and has passed adversely to defendant's rights and has deprived the defendant of one of his constitutional rights. This is all that is necessary to give the Supreme Court of the United States jurisdiction. In passing on such right does the Supreme Court of New Mexico correctly construe the law as to what a record must show? The real question is, does the record on its face show that every step essential to a valid judgment or verdict has been performed, and not as stated in a negative manner by the Supreme Court? The real question is fully laid down in the case of *Pettine v. Territory of New Mexico*, 201 Fed. 497, and *Crain v. U. S.*, 162 U. S. 644, wherein it is distinctly held that it should appear affirmatively from the record that every step necessary to the validity of a sentence has been taken, and that whether or not objections have been made at the trial of a case that the United States Appellate Courts will nevertheless, especially in capital cases, notice and correct grave errors apparent upon the record.

We are therefore not concerned with the statement made by the Supreme Court of New Mexico, to-wit:

> "There is nothing in the record to show but that such jury was selected in the manner required by law."

What we are concerned with is, does the record show affirmatively that the jury was selected in the manner provided by law? The Supreme Court of New Mexico did not say that the record affirmatively disclosed a valid jury. It did not dare say so, and we do not think that any court can possibly hold that the second jury was selected, empanelled, accepted and charged as required by law.

As we have heretofore stated it is true the record fails to disclose any objection to this jury upon the trial; still the question was raised clearly before the Supreme Court of the State of New Mexico as disclosed in the original opinion by the Supreme Court of the State of New Mexico (R. P. 51), where we find:

> "The third proposition discussed by appellant is that there was no valid jury empanelled and sworn to try the case, and therefore defendant was not accorded due process of law, as required by the Constitution of the United States and the laws of New Mexico."

The Sixth Amendment of the Constitution of the United States, which pertains to Territories, secures an impartial jury trial. The Fifth Amendment provides that no person shall be deprived of his life, liberty or property without due process of law. Due process of law, we take it, is synonymous with the law of the land. It has indeed been said that it would be impossible to give a definition of due process of law covering all cases. However, all the courts seem to agree that a trial in accordance with due process of law means that a trial must be had and conducted according to the prescribed forms according to the law of the land.

Matter of Buchanan, 146 N. Y. 271;
Hall v. Armstrong, 65 Vt. 421;
30 Wis. 129-149;
Hagar v. Reclamation District, 111 U. S. 708, citing from *Hurtado v. California;*
Ry. v. Humes, 115 U. S. 520;
Murray's Lessees et al. v. Hoboken Land Co., 8 How. 280.

The Supreme Court of New Mexico in a recent case, *Territory v. Prather,* 18 N. M. 195, 135 Pac. 83, held that the jury must be selected, empanelled and sworn in the manner required by the statute and a material departure from the statutory method, by which a party is deprived of a substantial right, is ground for reversal. In concluding this portion of our argument we wish again to quote from two decisions by Federal Courts. In *Crain v. U. S.,* 162 U. S. p. 644, the court say:

> "Neither sound reason nor public policy justify any departure from settled principles applicable in criminal prosecutions for infamous crimes. Even if there were a wide divergence among the authorities on this subject safety lies in adhering to the established modes of procedure devised for the security of life and liberty. Nor ought the court, in their abhorence of crime, nor because of their anxiety to enforce the law against criminals, to countenance the careless manner in which the record of cases involving the life or liberty of an accused are often prepared. Before a court of last resort affirms a judgment of conviction of, at least, an infamous crime, it should appear affirmatively from the record that every step necessary to the validity of the sentence has been taken. * * * And the record of his conviction should show distinctly, and not by inference, that every step involved in due process of law and essential to a valid trial, was taken in the trial court; otherwise the judgment will be erroneous."

In the case of *Pettine v. Territory of New Mexico,* 201 Fed. 497, the court say:

> "The Supreme Court of New Mexico disregarded the two errors which have been last discussed because they were not properly presented to the trial court by suitable request, objection and exception. But in criminal cases where the life, or as in this case the liberty, of the defendant for the probable remainder of his natural life is at stake, the Courts of the United States in the exercise of sound discretion may notice grave errors in the trial of a defendant although the questions they present were not properly raised in the trial court by request, objection or ex

ception. * * * The liberty of the defendant below for more than four decades, if he should so long live, probably depends upon the decision of this case. He may not be deprived of this liberty lawfully without a fair trial free from error according to the course of the common law."

From the foregoing it must be evident that no common law jury was empanelled, selected, accepted, charged and sworn to try the issues in this cause and therefore we respectfully submit that the Supreme Court of the United States should reverse the decision of the Supreme Court of the State of New Mexico on both the first and second specifications of error and should direct that the defendant be forthwith discharged.

Respectfully submitted,

T. B. CATRON,
Santa Fe, N. M.
Attorney for Plaintiff in Error...

Office Supreme Court
FILED
SEP 5
JAMES D. MA

BRIEF FOR DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 123

Benito Lovato, *Plaintiff in Error,*

vs.

The State of New Mexico.

FRANK W. CLANCY,
Attorney General of New Mexico.

New Mexican Printing Company, Santa Fe, N. M.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 123.

BENITO LOVATO, *Plaintiff in Error,*
vs.
STATE OF NEW MEXICO.

PRELIMINARY.

An examination of the assignments of errors, beginning on page 58 of the printed record, will show that there are but two questions presented for discussion in this court, the first of which is as to whether the defendant was put twice in jeopardy for the same offense, while the other is as to whether any valid jury was empaneled and sworn to try the case in the district court of the county of Taos in the Territory of New Mexico.

The portions of the record material to the first of these questions are as follows:

On page three of the printed record it appears that on May 9, 1910, the defendant pleaded not guilty, and that issue was joined on that plea.

On page thirteen it is shown that on May 24, 1911, the defendant filed a demurrer to the indictment, but the record does not anywhere show that the plea of not guilty had been withdrawn so as regularly to permit the filing of the demurrer.

On pages fourteen and fifteen appears the record of proceedings in the District Court on May 24, 1911, which is as follows, omitting the names of the jurors only, with the

statement that the names are the same where they appear the second time as the names previously in the record:

"Territory of New Mexico

vs.

Benito Lovato.

Comes now the plaintiff in the above entitled cause by her District Attorney, E. C. Abbott, Esq., and her Special Prosecutor, A. B. Renehan, Esq., and comes now the defendant, Benito Lovato, in his own proper person, attended by his counsel, C. C. Catron, Esq.

Attorney for defendant calls up for hearing the amended motion of the defendant for a continuance of the above cause, heretofore filed in this cause, on the 2nd day of May, 1911, the same being the 2nd day of the regular May term of the District Court for the County of Taos, for the year 1911; whereupon the court hears arguments of counsel for and against said motion, and being otherwise sufficiently advised in the premises, overrules the same.

And now again comes said attorney for said defendant and calls up for hearing the additional motion for a continuance or affidavit of T. B. Catron, whereupon the court hears the argument of counsel for and against said motion, and being otherwise sufficiently advised in the premises, overrules the same.

And now again comes said attorney for said defendant and calls up for hearing the demurrer, heretofore filed on, to-wit, the 23rd day of May, to said indictment; whereupon the court hears the arguments of counsel for and against said demurrer, and being otherwise sufficiently advised in the premises, overrules the same.

Whereupon, both parties announce themselves ready for trial, and now comes the jury as follows, to-wit:

(Names omitted)

twelve good and lawful men taken from the body of the county of Taos and Territory of New Mexico, duly empanelled, selected, accepted and sworn to well and truly try the issues joined in the cause

now pending, and a true verdict therein to render according to the law. ... evidence and the instructions of the court.

That thereupon the witnesses for both plaintiff and defendant were called and sworn and placed under the rule.

That thereupon it appearing to E. C. Abbott, Esq., District Attorney, that defendant had not been arraigned and had not plead since the overruling of defendant's demurrer, upon motion of the court dismissed the jury and directed that the defendant be arraigned and plead.

Thereupon, upon the reading of the indictment herein to the defendant, Benito Lovato, in open court, for plea thereto, says that he is 'not guilty' in manner and form as therein charged.

And now the issues in the above entitled cause being joined, both parties again announce themselves ready for trial, and now comes the jury as follows, to-wit:

(Names omitted)

twelve good and lawful men taken from the body of the County of Taos, and Territory of New Mexico, sworn to well and truly try the issues joined in the cause now pending, and a true verdict therein to render according to the law, the evidence and the instructions of the court; hear a portion of the evidence and retire in care and custody of two duly and especially sworn bailiffs of this Court for the night. It is ordered that the court do now adjourn until tomorrow morning at nine o'clock."

On pages thirty-six and thirty-seven of the record will be found the motion of the defendant to instruct the jury to find a verdict of not guilty, and the reasons therefor, which motion was made at the conclusion of the evidence for the Territory, and the third reason assigned in that motion is:

"That the record of the court shows former jeopardy in that it shows that a jury had, prior to the trial, been duly called, empaneled and sworn to try this case and the charge contained in the said indictment, and that thereafter the jury was dismissed."

As to the other question of the validity of the jury which tried the case, there is nothing to be found in the record of proceedings in the district court beyond what appears on pages fourteen and fifteen of the printed record, and it does not appear that the objection to the jury was ever presented to the district court.

POINTS AND AUTHORITIES.

FIRST.

The record does not show that defendant was twice put in jeopardy.

It was contended for plaintiff in error, in the Supreme Court of New Mexico, that the record shows that a jury was empaneled to try appellant before arraignment and plea and when the lack of such arraignment was discovered, the jury was discharged and after arraignment was resworn to try the case, and that, after the discharge of the jury, the defendant could not be put on his trial because jeopardy had attached and the discharge of the jury must necessarily operate to release the defendant.

This position is unsound for two reasons, the first of which is that if there were no plea and issue thereon when the jury was first called, no trial was possible and no jeopardy would attach.

Territory v. Gonzales, 13 N. M. 94, 97.
U. S. v. Aurandt, 15 N. M. 292, 297.

The authorities are "to the effect no jeopardy attaches until an issue has been made by plea."

This position of plaintiff in error is also bad because it does not correctly state the facts disclosed by the record, copy of so much of which as relates to the proceedings when the case was called for trial is printed on pages 14 and 15 of the printed record brief and has been hereinbefore quoted. Attention should be called, however, to the fact that on May 9, 1910, as will appear by reference to page 3 of the record, the plaintiff in error was arraigned, pleaded not guilty, and upon that plea issue was regularly joined, and to the further fact that at no time thereafter did the plaintiff in error ever withdraw, or ask leave of the court to withdraw,

his plea of not guilty, although on May 24, 1911, his attorney filed a demurrer to the indictment, which appears on pages 13 and 14 of the record. The demurrer could not properly be filed with the record in this condition without leave of the court, and without the withdrawal of the plea theretofore made. It may be argued that such withdrawal and such leave by the court are to be implied from the fact that on the same day the court took notice of the demurrer and overruled it, but when the plaintiff in error is seeking to avail himself of such a point as this where the record does not show that he could have been in any way injured by what was done, or not done, he ought not to be permitted to set up a mere implication in order to sustain the objection which he makes, but the court should limit itself to that which appears upon the record without expanding it for the purpose of favoring one who has been found guilty of a homicide by the verdict of a jury, and who cannot now invoke any presumption in his favor which may have existed before the rendition of that verdict.

The action of the court in passing upon the demurrer had no effect upon the previous plea and joinder of issue which remained in full force and there was no need of any new arraignment or plea, and the action of the court in re-arraigning the defendant was superfluous and unnecessary. The interposition of a demurrer out of its proper order while a plea was on the record, undisposed of, should be entirely disregarded.

The record does not distinctly indicate that the court discharged the jury from consideration of the case before the defendant was rearraigned, nor does it distinctly indicate that after the unnecessary rearraignment and plea, the jury was again sworn. It is only by injecting something into the record which is not there in words, that counsel can maintain that the court ever discharged the jurors from the consideration of the case, or that they were resworn at a later stage of the proceedings, and as we have already urged, a convicted defendant who relies upon purely technical points which, under the circumstances disclosed by the record, could not have affected him injuriously, cannot hope, as to such matters, to receive any different treatment from that which he seeks to apply to the judicial proceedings of which he complains.

It will be noticed that the record says that "the court dismissed the jury," and that is all it says as to what was done with the jury. Taking the whole record together, it would seem that the court kept the jury at hand, and after the rearraignment, proceeded with the trial. After the second enumeration of the jury and their characterization as "twelve good and lawful men taken from the body of the county of Taos, and territory of New Mexico," follow the words "sworn to well and truly try the issues joined in the cause now pending," which words do not say that the jurors were sworn at that time and may be taken to relate to the fact of their having been sworn as stated in the earlier part of the same record entry. This may or may not have been the actual fact, but on this review of the case the court is necessarily limited to what it finds in the record.

Examination of authorities where any similar point has been discussed will show that in all cases where it was held that arraignment and plea were necessary after the overruling of a demurrer, the record shows that the plea first interposed had been withdrawn by leave of the court for the purpose of permitting a demurrer to be filed, and it is believed that no case can be found sustaining such objection as the one here made in any case after a plea of not guilty has been entered, unless that plea had been entirely withdrawn.

Territory v. Gonzales, 13 N. M. 94, 97.
Hensche v. People, 16 Mich. 46.
State v. Hunter, 8 So. 624.
People v. Monaghan, 102 Cal. 229.
Morton v. People, 47 Ill. 468.
Hatfield v. State, 9 Ind. App. 296.
Lamphere v. State, 114 Wis. 193, 199.
People v. Bradner, 107 N. Y. 1, 9-10
West v. State, 48 Ind. 483.
Joy v. State, 14 Ind. 139, 148-9.
Gormley v. State, 37 Ohio St. 120.

To summarize the argument here made, the contention of the state is that a plea of not guilty having been entered and issue joined thereon, and that plea never having been withdrawn, the overruling of a demurrer subsequently filed without leave of the court, and the rearraignment of the de-

fendant, are superfluous and unnecessary parts of the record and could have had no effect upon the issue which had already been joined; that the record does not show that the jury was ever discharged from the consideration of the case until after it had returned a verdict, nor that it was sworn a second time to try the case, and that therefore the trial was properly had upon the issue joined in May, 1910.

In response to the statements hereinbefore contained that the course taken in the court below could not have affected the defendant injuriously, it might possibly be urged that defendant and his counsel, knowing or believing that there was no issue joined, might not have examined the jurors with the same care as they otherwise would have done, taking the view that no conviction could be sustained. Such a suggestion cannot be seriously entertained because it would necessarily impute to defendant's counsel a lack of good faith in his dealing with the court, which would be a violation of the spirit of the 4th subdivision of Section 27 of Chapter 53 of the Laws of 1909, and of the general rules of professional ethics independent of any statute, which would justly subject him to the criticism made by the Supreme Court of New Mexico in the case of *Territory v. Pettine,* reported in 16 N. M. at page 51. There can be no doubt that counsel for a defendant in a criminal case, when it comes on for trial, is in duty bound to call the attention of the court to the fact, if he is aware of it, that there has been no arraignment, plea or issue joined between the state and defendant.

The New Mexico statute above referred to now reappears in the Codification of 1915 in Section 353, and it declares that it is the duty of an attorney at law

> "To employ, for the purpose of maintaing causes confided to him, such means only as are consistent with truth, and never to seek to mis-lead the judges by any artifice or false statement of fact or law."

SECOND.

The question of former jeopardy was not so raised in the district court as to make it reviewable in the appellate court.

This position was distinctly taken by the Supreme Court

of the State of New Mexico, as will be seen by reference to pages forty-eight to fifty-one of the printed record. The following, taken from the opinion of the court, is adopted as a part of the argument in this brief:

> "The defendant did not plead former jeopardy specially, neither did he raise it by motion or call it to the attention of the court in any manner prior to entering upon the trial of the case, but at the conclusion of the testimony on the part of the territory, he interposed a motion for an instructed verdict, and, as one of the grounds for said motion, attempted to raise the question of former jeopardy as follows:
>
> "'That the record of the court shows former jeopardy in that it shows that a jury had, prior to this trial, been called, empaneled and sworn to try this case and the charges contained in the said indictment, and that thereafter the jury was dismissed.'
>
> "Former jeopardy was also relied upon in a motion filed in arrest of judgment.
>
> "In the view we take of the question, it is not necessary for us to determine the question as to whether or not the defendant was placed in jeopardy by the swearing of the first jury for the reason that the matter was not properly raised or presented to the court. Sec. 3422, R. S. 1897, is as follows:
>
> "'In criminal cases the common law, as recognized by the United States and the several states of the Union, shall be the rule of practice and decision.'
>
> "Several of the states have statutes altering the common law provisions as to practice and procedure in criminal cases. Some such statutes provide that a defendant may put in issue, under a plea of not guilty, all defense which he may have to the charge upon which he is being prosecuted, and in those states it is uniformly held that he may prove under such general issue, former jeopardy, or autrefois acquit or convict. However, according to the doctrine of the common law it is held in most of the states, that the defense of former jeopardy, or former conviction or acquittal, must be specially

pleaded, and such defenses are not admissible under the general issue.

9 *Ency. Pl. & Pr.* 630.

" 'The defendant's plea of not guilty puts in issue all of the allegations of the indictment or information, and nothing more. In this case the defendant would not have been allowed to prove at the trial that he had been once in jeopardy, for there was no such issue in the case, and could be none unless he saw fit to make it by plea.'

People v. Bennett, 114 Cal. 56.

"In that case the defendant filed no special plea, and attempted to raise the question of former jeopardy by his motion for a new trial. The court held that this could not be done, for it would be permitting the defendant to introduce evidence upon his motion for a new trial that would not have been admitted if offered at the trial. The defendant going to trial upon the general issue of not guilty, and having filed no special plea in bar, setting up former jeopardy, could not introduce in evidence such former jeopardy, and as he could not introduce such fact in evidence, he could not rely upon it in his motion for an instructed verdict.

" 'The whole question of once in jeopardy was entirely foreign to the case, unless raised by a special plea, and, when so raised, an issue of fact was presented, which the jury alone possessed the power to pass upon.'

People v. Bennett, supra.

"In the California case above cited, the defendant was being prosecuted upon the same information under which he claimed former jeopardy had attached.

"See also *Zachary v. State,* 7 Baxt. 1; *State v. Washington,* 28 La. Ann. 78; *State v. Barnes,* 32 Me. 534; *Rickles v. State,* 68 Ala. 538.

"Also *De Arman v. State,* 79 Ala. 10, where the court held that a former conviction or acquittal must be specially pleaded, and when so pleaded, the issue joined on it must be tried and determined before the issue on the plea of not guilty is submitted to the jury.

"In the case of *State v. Buzzell*, 58 N. H. 257, the court, in speaking of the defense of former acquittal, or former jeopardy, says:

" 'Former acquittal or former jeopardy, as a defense, is a plea of discharge or release that gives a reason why the defendant ought not to answer the indictment, and ought not to be put upon trial for the crime alleged. 4 *Bl. Com.* 335. The plea of not guilty raises the question, not whether, by former acquittal or jeopardy, he is discharged from a crime, but whether he committed it. When, as in this case, there is an opportunity to plead former judgment or jeopardy, and it is not pleaded, the case is as if there were no former judgment or jeopardy.'

"See also *Gunter v. the People*, 22 Colo. 121, where the Court held that former acquittal, or conviction, must be pleaded specially, evidence of either not being admissible under the plea of not guilty.

"The Supreme Court of Massachusetts, in the case of *Commonwealth v. Chesley*, 107 Mass. 223, state the rule as follows:

" 'If the defendant relied upon former acquittal, he should have pleaded it specially, so that issue might have been taken upon it either to the court or the jury. It cannot be proved under the general issue.'

"In the case of *McBean v. State*, 3 Heisk. 20, the defendant had filed a formal plea in bar of former conviction, but such plea was not urged by counsel, and they proceeded with the trial without first insisting on a determination of the plea so filed. After examining one witness they attempted to rest and secure a determination upon such plea; the right to do so was denied. The court say:

" 'The defendant and his counsel were bound to know and to take notice of the pleadings which were on file in the case; and going to trial upon the plea of "not guilty" alone, was a waiver of the defense of former conviction.'

"See also *In re Allison*, 23 Colo. 525, where the court held that the defense of prior jeopardy for the same crime should be presented by special plea to the trial court. See also *Logan v. State*, (Miss.) 40 So. 323; *Commonwealth v. Merrill*, 8 Allen, 545.

"It is true cases can be found holding that it is not necessary to plead former jeopardy where such fact appears upon the record in the case upon trial, but an examination of the cases so holding will demonstrate the fact that the courts in such cases apparently entirely overlooked the common law rule, and no good reason, we believe, can be advanced in support of such doctrine. Former jeopardy is properly a plea in bar of the action, and it does not go to the merits. If such plea is well taken it disposes of the case. It has nothing to do with the question of the guilt or innocence of the defendant.

"For the reason stated we are of the opinion that the court did not err in refusing to direct a verdict of not guilty upon the ground of former jeopardy."

In this connection we invite also attention to the opinion of the Supreme Court of New Mexico on the motion for a rehearing, which appears at pages fifty-four to fifty-six of the record.

THIRD.

There is nothing in the record to show even an irregularity in the empaneling of the jury.

We have hereinbefore quoted from pages fourteen and fifteen of the record all that appears concerning the jury. It will be seen that the form of record entry is substantially the same as that which will be found in any common law jurisdiction where there are no statutory provisions adding to what would appear in a common law record. It is shown that after the case was ready for trial there came a jury, "twelve good and lawful men taken from the body of the county" who were "duly empaneled, selected, accepted and sworn to well and truly try the issues joined in the cause now pending, and a true verdict therein to render, according to the law, the evidence and the instructions of the court." Then follows the suggestion by the district attorney, on the record, that the defendant had not been arraigned and had not pleaded after the overruling of a demurrer, and "upon motion the court dismissed the jury and directed that the defendant be arraigned and plead." Then

follows the arraignment and plea of not guilty, and a recital that the issues being joined, both parties again announced themselves ready for trial, and then comes the jury,

> "twelve good and lawful men taken from the body of the County of Taos, and Territory of New Mexico, sworn to well and truly try the issues joined in the cause now pending, and a true verdict therein to render according to the law, the evidence and the instructions of the court."

This view has been already stated under the first point in this brief, and it is here restated only for the purpose of emphasizing the correctness of our position and of calling attention distinctly to the fact that the record of the empaneling and swearing of the jury is quite as full as would be required in any common law jurisdiction.

After the second arraignment and plea, it will be noticed that the defendant announced himself ready for trial, and without raising any objection to the jury or its validity, or method of empaneling and swearing, went to trial. He made no objection, nor is there any objection to the jury to be found anywhere in the record of proceedings in the district court. To tolerate the making of such an objection in an appellate court for the first time would be destructive of all regularity of procedure and in total disregard of the well established doctrine that any error relied upon should be called to the attention of the trial court in some form.

Owing to condition of business in my office, this brief has been necessarily prepared in advance of seeing any brief for plaintiff in error, and it is possible that a reply to the brief for plaintiff may appear necessary when that brief is received.

It is respectfully submitted that there is no error to be found in the record which will sustain either of the two assignments of errors presented by the plaintiff in error, and that the judgment of the Supreme Court of New Mexico should be affirmed.

FRANK W. CLANCY,
Attorney General for New Mexico.

LOVATO *v.* STATE OF NEW MEXICO.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW MEXICO.

No. 123. Submitted November 16, 1916.— Decided December 11, 1916.

In a criminal case tried in a District Court of a Territory and coming here by way of the Supreme Court of the State into which the Territory was afterwards converted, defenses based on the Fifth and Sixth Amendments (in part not raised until the case reached the latter court) are within this court's jurisdiction to consider.

Quære, Whether under the Constitution a defense of former jeopardy is waived if not made before the prosecution has introduced its evidence in chief?

Defendant was arraigned and pleaded not guilty to an indictment for murder; on a day subsequent, without withdrawing the plea, he demurred to the indictment as not charging an offense. The demurrer being overruled, both sides being ready for trial, a jury was duly impanelled and sworn and the witnesses for both sides called and sworn, but on motion of the prosecuting officer the court dismissed the jury and directed that the defendant be arraigned anew. This was done forthwith, the accused pleaded not guilty again, and both sides being ready, the same jury was sworn once more and the trial proceeded to a conviction.

Held, (1) Not double jeopardy.

(2) Due process and the right to a jury, under the Fifth and Sixth Amendments respectively, did not require that a new jury be impanelled after the second arraignment and plea.

(3) Under the circumstances, dismissing the jury to allow of the second arraignment and plea, whether a necessary formality or not, was clearly permissible.

17 N. Mex. 666, affirmed.

THE case is stated in the opinion.

Mr. T. B. Catron for plaintiff in error.

Mr. Frank W. Clancy, Attorney General of the State of New Mexico, for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

In the District Court of the Territory of New Mexico the accused, on May 9th, 1910, pleaded not guilty to an indictment for murder. On May 24, 1911, without withdrawing his plea he demurred to the indictment on the ground that it charged no offence. The demurrer was overruled and, both parties announcing themselves ready for trial, a jury was impanelled and sworn and the witnesses for both sides were called and sworn. The record then states: "That thereupon it appearing to E. C. Abbott, Esq., District Attorney, that defendant had not been arraigned and had not plead since the overruling of defendant's demurrer, upon motion the court dismissed the jury and directed that the defendant be arraigned and plead." The accused was accordingly again at once arraigned and pleaded not guilty and, both sides again announcing themselves ready for trial, the same jury previously impanelled was sworn and the trial proceeded. At the close of the evidence for the prosecution the defendant moved for a directed verdict on the ground, among others, that the record showed that he had been formerly placed in jeopardy for the same offence, since it appeared that in the same case a jury had been impanelled and sworn and thereafter had been dismissed from a consideration of the case. The motion was denied and a conviction of manslaughter followed. The same ground was relied upon in a motion in arrest of judgment which was denied and from the judgment and sentence subsequently entered an appeal was prosecuted to the Supreme Court of the Territory.

Pending the appeal New Mexico was admitted to the Union and the case was heard by the Supreme Court of the State. In that court in addition to the contention as to former jeopardy the accused urged that he had been

denied due process of law and had been deprived of the right to a trial by jury because from the record it appeared that although a jury was impanelled before he was arraigned and pleaded not guilty, that jury was dismissed and it did not appear that any jury was impanelled after his arraignment and plea. The court held this contention to be without merit and concluded from a consideration of the common-law doctrine of former jeopardy, in the light of which it deemed the constitutional provision on the subject was to be construed, that the question concerning it was raised too late, since it was first presented to the trial court after the conclusion of the state's case. To the judgment of affirmance giving effect to these conclusions this writ of error was prosecuted. 17 N. Mex. 666.

As the case was tried in a territorial court, the denial of asserted rights based upon the Fifth and Sixth Amendments presents questions within our jurisdiction.

Without expressing any opinion as to the correctness of the ruling of the court below concerning the failure to promptly raise the question of former jeopardy, although on this record it may be conceded it presents a federal question, we pass from its consideration, since we think the contention that the accused was twice put in jeopardy is wholly without merit. Under the circumstances there was in the best possible view for the accused a mere irregularity of procedure which deprived him of no right. Indeed, when it is borne in mind that the situation upon which the court acted resulted from entertaining a demurrer to the indictment after a plea of not guilty had been entered and not withdrawn, it is apparent that the confusion was brought about by an over-cautious purpose on the part of the court to protect the rights of the accused. Whether or not under the circumstances it was a necessary formality to dismiss the jury in order to enable the accused to be again arraigned and plead, the action taken was clearly within the bounds of sound judicial discretion.

United States v. *Perez*, 9 Wheat. 579, 580; *Dreyer* v. *Illinois*, 187 U. S. 71, 85–86. See *United States* v. *Riley*, 5 Blatchf. 204, in which the facts were in substance identical with those here presented.

As to the contention concerning the denial of due process and the right to jury trial, it is not disputed that in the first instance a jury was legally impanelled. The argument is, however, that constitutional rights of the accused were violated because after the order of dismissal and the plea of not guilty there was a failure to impanel a jury, although the same jury previously drawn was at once sworn and tried the case. But we think the absolute want of merit in the proposition is manifest from its mere statement and is additionally demonstrated by what we have previously said.

Affirmed.